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300.534 Carriage of local commercial television signals 4998
300.534 Carriage of local commercial television signals 5002
300.534 Carriage of local commercial television signals 5007
300.534 Carriage of low power television station signals 5011
300.535 Carriage of noncommercial translator station signals 4971
300.614 Carriage of Local Commercial Television Signals. 4929
400.181464 Broadcasting Obscene or Indecent Language 5149

500.3110 Failure to Prosecute 4974
500.3525 Settlement Agreement 4973

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-50

In the Matter of

Amendment of Section 73.202(b), RM-8581
Table of Allotments,
FM Broadcast Stations.
(Willcox, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 17, 1995; Released: May 1, 1995

Comment Date: June 22, 1995
Reply Comment Date: July 7, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of William S. Konopnicki ("petitioner"), licensee of Station KWCX-FM, Channel 252A, Willcox, Arizona, seeking the substitution of Channel 285C3 for Channel 252A and modification of his license accordingly.[1] Petitioner stated his intention to apply for Channel 285C3 if it is allotted to Willcox, as requested.

2. A staff analysis has determined that Channel 285C3 can be allotted to Willcox consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules at the petitioner's specified site, located 16.2 kilometers (10.1 miles) east of the community at coordinates 32-14-48 and 109-39-52. Additionally, as Willcox is located within 320 kilometers (199 miles) of the Mexican border, the Commission must seek concurrence of that Government in the proposal.

3. As petitioner's proposal could provide Willcox with an expanded coverage area FM service, we shall propose to modify the license of William S. Konopnicki for Station KWCX-FM, as requested. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the Class C3 allotment proposal at Willcox, petitioner has indicated that another equivalent channel is available.

4. In view of the above, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Willcox, Arizona, as follows:

City	Channel No. Present	Proposed
Willcox, Arizona	252A	285C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 22, 1995**, and reply comments on or before **July 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's consultant, as follows:

Dennis Silver, P.E.
Consulting Engineer
3404 West 2640 South
West Valley City, Utah 84119-1625

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who

[1] Petitioner's request was verified by its technical consultant. We are unable to determine from the petition if petitioner's consultant is also a principal of the petitioner. Although a petitioner may seek assistance in the preparation of a pleading or petition for rule making, Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel, be signed and verified by the commenting or petitioning party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919, n.41 (1990). Petitioner is requested to rectify this omission in his comments.

filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TV Auxiliary Use of Vacant UHF-TV Channels. RM-7568

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1995; Released: May 1, 1995

By the Commission:

INTRODUCTION

1. This *Memorandum Opinion and Order* is in response to a petition for rule making, RM-7568 submitted by the National Association of Broadcasters ("NAB"), and responsive comments.[1] NAB proposes amendments to our rules concerning the use of vacant UHF-TV channels for television auxiliary services. For the reasons stated below we deny the NAB petition for rulemaking.

2. Currently, rule Section 74.602(i) allows TV studio-transmitter-link (STL) and TV relay facilities[2] to operate on UHF-TV channels 14-69 on a secondary non-interference basis, provided they meet certain interference protection provisions under Subpart G of Part 74 of our rules.[3] 47 C.F.R. § 74.602. However, the rules do not explicitly specify operational parameters for STL or relay stations transmitting on these channels.

THE PETITION

3. NAB expresses concern about potential interference to regularly authorized television service by broadcast auxiliary stations, and the potential use of these stations to extend the reception area of associated low power TV stations. It therefore requests that the Commission adopt new rules requiring the filing of an interference analysis with applications for STL's and TV relay stations, and requiring such licensees to employ scrambling techniques so that there signals would be incompatible with consumer television receivers.[4] Pending such action in a rulemaking proceeding, NAB requests that the Commission freeze its acceptance of all auxiliary applications filed pursuant to rule Section 74.602(i).[5]

COMMENTS

4. The comments of WSBT-TV, MSTV, and Mr. Larry H. Will are generally supportive of NAB's petition. Mr. Will further suggests that licensees of these facilities should be required to take further steps to prevent reception of the auxiliary link by the public by employing very narrow beamwidth antennas and minimum necessary power.

5. CBA agrees that abuse of the UHF STL rule should be prevented, but urges the Commission to avoid creating undue burdens for STL applicants by requiring the submission of expensive interference studies. As an alternative, CBA suggests that if the Commission finds that an applicant's parameters indicate potential interference, the applicant should be afforded an opportunity to make a showing that interference will not occur in actual operation. CBA also asserts that mandatory encryption of STL signals would impose an unwarranted cost burden on economically marginal stations. Finally, CBA claims that the Commission is already carefully scrutinizing applications for STL facilities on UHF-TV channels and questions the merit of the measures sought by NAB in its petition.

6. In its reply comments, NAB asserts that it does not wish to impose unnecessary burdens on LPTV stations, or on any other service. However, NAB maintains that requiring Section 74.602(i) applicants to provide a technical showing that clearly demonstrates compliance with the interference protection criteria of Subpart G will ensure that such auxiliary facilities are carefully designed to avoid potential interference to other existing services.

DISCUSSION

7. STL's and TV relay stations are not intended for reception by the general public (as distinguished from the low power TV, TV translator and TV booster facilities authorized by Subpart G of Part 74 of our rules). All licensees operating in this manner are advised to provide a

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[1] See *Public Notice*, Report No. 1833, January 14, 1991, RM No. 7568. The Commission received comments from the Community Broadcasters Association ("CBA"), a trade association whose members are licensees of low power television stations; WSBT Inc., licensee of WSBT-TV, Channel 22, South Bend, Indiana; the Association of Maximum Service Television, Inc. ("MSTV"), a trade association representing over 250 television stations; and, Larry H. Will, P.E., an area frequency coordinator for broadcast auxiliary stations.

[2] See rule Section 74.601(b)&(c) for definitions of TV STL's (studio-transmitter-link) and TV relay stations. 47 C.F.R. § 74.601. An STL is a fixed station used to transmit program material and related communications between a studio and transmitter of a broadcast station. A TV relay is characteristically used for transmission of program material and related communications, such as intercity relay between broadcast stations for use by broadcast stations. In essence, both facilities are radio links used between two fixed points whose primary purpose is to carry program material.

[3] For instance, see rule Sections 74.705, 74.707, and 74.709 under Subpart G for interference protection criteria for TV broadcast stations; low power TV and TV translator stations; and land mobile stations, respectively. 47 C.F.R. §§ 74.705, 74.707, 74.709.

[4] NAB notes that to make another proposed secondary signal incompatible with consumer television receivers, scrambling was considered in a *Further Notice of Proposed Rule Making* in MM Docket No. 85-36, 2 FCC Rcd, page 3129 (1987). That Notice proposed to extend the sharing of UHF-TV channels to portable broadcast auxiliary TV pickup stations (including *e.g.*, the use of wireless cameras) on a secondary non-interference basis. Subsequently, in light of limited industry support, no rules were adopted and the proceeding was terminated without prejudice in *Order* in MM Docket No. 85-36, 7 FCC Rcd 490 (1992).

[5] In seeking the freeze, NAB requests waiver of the procedural rules contained in rule Section 1.44(e) to allow for the joint submission of these "consolidated and closely related" matters for Commission action. As NAB's petition for rulemaking is denied, its waiver and freeze requests are dismissed as moot.

narrow beam, point-to-point signal path. While it is theoretically possible for STL or relay facilities operating on UHF-TV channels to provide direct service to the public, we are not aware that this is occurring, either intentionally or inadvertently, and neither NAB nor any commenters provided any evidence of or information indicating such occurrences. Moreover, should unintended reception of relayed signals occur, the extent would be very limited, given the operational parameters that we have found appropriate to authorize for STL and relay facilities. However, appropriate administrative action will be taken with regard to specific cases of misuse brought to the attention of the Commission.

8. In its petition, NAB submitted an illustration of the problem describing an LPTV station's actual application for use of a UHF-TV channel for STL operation. However, because that application did not meet the protection requirements of Sections 74.705(b)(4) and (5), it was not granted. Thus, NAB's example demonstrates that existing protections in our rules can address this issue.

9. CBA is correct that the Commission currently examines closely UHF-TV STL applications. Transmitter power and antenna radiation patterns are being given close scrutiny in the application review process. For example, while Section 74.636, which governs power limitations, does not explicitly include the UHF-TV channels in its list of frequency bands for television auxiliary services, it does limit such facilities' transmitter peak output power on all listed frequency bands to "*not be greater than necessary.*" Thus, maximum transmitter output powers greater than 20 watts are not authorized without sufficient justification. (*See* 47 C.F.R. § 74.636.)

10. Similarly, Section 74.641 has been followed carefully in processing UHF-TV band STL and relay station applications. Section 74.641 specifies maximum radiation pattern beamwidths for the various microwave frequency bands,[6] but not for the UHF bands. In processing UHF STL applications, the staff has and will generally continue to consider an antenna beamwidth of 25 degrees as a reasonable attainable performance with commonly available antennas, and therefore use it as our guideline for questioning applicants concerning use of minimum necessary power.[7] The comments of Larry H. Will also support this contention. Mr. Will observes that while it is very difficult to construct narrow beamwidth antennas at UHF frequencies, it is possible to attain 3 dB beamwidths of less than 30 degrees.[8]

11. As a matter of policy, the Commission has been utilizing the power and antenna rules described above in determining compliance with Section 74.636 while processing applications for STL and relay facilities on UHF-TV channels. Therefore, we do not agree with NAB that rule amendments to specify transmitter power and antenna beamwidth limits are necessary. Applicants requesting a power output in excess of 20 watts or a transmitting antenna beamwidth in excess of 25 degrees (measured at the -3 dB points) are asked to submit an engineering analysis demonstrating why the higher output power or wider beamwidth is necessary.

12. On the basis of our experience in processing these applications, we believe that the current provisions of Section 74.602(i), which restricts TV STL's and relay stations on UHF-TV channels to secondary non-interfering status, adequately guard against interference. This section also requires these facilities to comply with provisions of Subpart G of the rules. Thus, such STL's and relay facilities must meet the protections criteria, as outlined in Sections 74.705, 74.707, and 74.709 of Subpart G, for the primary licensees of the UHF-TV spectrum, that is, TV stations, LPTV's and TV translators, and land mobile stations. Therefore, the primary services are sufficiently protected from interference under Section 74.602(i).

CONCLUSION

13. In view of these existing constraints on objectionable interference and service abuses, we believe that imposing a scrambling requirement, as suggested by NAB, on UHF-TV STL facilities at this time is unnecessary and would represent an unwarranted cost burden on economically marginal stations.

14. Moreover, current rules provide the Commission appropriate control to resolve any cases of inappropriate use or interference should they occur. We note that in cases where the rules in Part 74 do not cover all phases of operation, Section 74.28 permits the Commission to make supplemental orders in each case as deemed necessary.

15. Accordingly, IT IS ORDERED THAT, pursuant to 47 U.S.C. Sections 154 and 303, NAB's petition for rule making to amend Section 74.602(i) and request for a freeze on accepting applications submitted pursuant to Section 74.602(i), ARE DENIED.

16. Further information may be obtained from Bernard Gorden, Mass Media Bureau, Engineering Policy Branch, (202) 418-2190.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] For 1,990 to 2,110 MHz, the microwave auxiliary band closet to the UHF-TV band, Section 74.641 permits a maximum beamwidth of five degrees. 47 C.F.R. § 74.641

[7] It is difficult to achieve the very narrow microwave beamwidths in the UHF spectrum. Larger beamwidth antennas, in turn, generally have less main lobe power gain and therefore require more transmitter power to achieve a desired effective radiated power.

[8] For example, Mr. Will indicates that a 6 foot diameter grid parabolic antenna has a beamwidth of less than 30 degrees at channel 14 and less than 13 degrees at channel 69.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

UNITED TELEPHONE COMPANY OF OHIO, and — File No. E-92-26
UNITED TELEPHONE COMPANY OF INDIANA, — File No. E-92-27
Defendants.

ORDER

Adopted: April 19, 1995; Released: May 1, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1992, LiTel Telecommunications Corporation filed the above-captioned complaints against the defendants seeking to recover damages from the defendants for alleged violations of the Commission's rules in connection with the defendants' computation and assessment of terminating carrier common line ("CCL") charges. On April 14, 1995, the parties filed joint motions to dismiss the complaints stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motions to dismiss the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motions to Dismiss ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER COMMUNICATIONS
INTERNATIONAL, INC.

Application for authority to acquire and operate facilities for service to various overseas points.

File No. I-T-C-95-160

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 24, 1995; Released: May 1, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a partial grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-160 IS GRANTED IN PART, and Charter Communications International, Inc. (Charter) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1, PAS-2 and PAS-4 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 and TDRS-174 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Satellite Corporation (Orion) and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. establish one 64-kbps circuit between appropriately licensed U.S. earth stations and U.S. domestic satellites (also one 1.544 Mbps circuit on Anik satellites for service to Canada, and Mexican domestic satellites for service to Mexico), for provision of authorized transborder services between the United States and the points listed in Appendix E;

g. lease and operate any necessary domestic connecting facilities;

h. lease a one-half interest in and operate any necessary overseas connecting facilities; and

i. use the facilities in b, c, d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendices.

3. IT IS FURTHER ORDERED that neither Charter nor any persons or companies directly or indirectly controlling or controlled by Charter, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Charter or any persons or companies controlling or controlled by Charter are parties.

4. IT IS FURTHER ORDERED that our authorization of Charter to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, Charter may not -- and Charter's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, PAS-4, TDRS-41, TDRS-174, or Orion F1 satellites.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. IT IS FURTHER ORDERED that action on Section (h)(7) of Charter's application, which requests authority to acquire Morelos and Solidaridad circuits to countries in addition to Mexico, is hereby deferred. § 13. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX A
COUNTRIES TO BE SERVED VIA INTELSAT[1]

Atlantic Ocean Regions:

Latin America

Antigua	Curacao	Netherlands Antilles
Argentina*	Dominican Republic**	Nicaragua
Aruba	Ecuador**	Panama*
Bahamas	El Salvador**	Paraguay
Barbados	French Guiana	Peru**
Belize	Grenada	St. Lucia
Bermuda	Guantanamo Bay	St. Vincent
Bolivia	Guatemala	Surinam
Brazil*	Guyana	Trinidad & Tobago
Cayman Islands	Haiti	Turks & Caicos Is.
Chile*	Honduras**	Uruguay**
Colombia*	Jamaica	Venezuela*
Costa Rica**	Martinique	

Europe

Austria**	Ireland**	San Marino
Belgium*	Italy*	Slovenia
Croatia	Liechtenstein	Spain*
Cyprus	Luxembourg	Sweden*
Denmark**	Malta	Switzerland*
Finland**	Monaco	Turkey
France*	Netherlands*	United Kingdom*
Germany*	Norway**	Vatican
Greece**	Portugal	Serbia & Montenegro
Bosnia-Herzegovenia		TFYR of Macedonia

[1] One 1.544 Mbps circuit to each point marked by single *, six 64-kbps circuits to each point marked by double *, and one 64-kbps circuit to each of the other points.

Middle/Near East, Africa, Other Europe

Algeria	Belarus	Canary Islands
Angola	Benin	Cape Verde Is.
Armenia	Botswana	Central African Rep
Ascension Is.	Bulgaria	Chad
Azerbaijan	Burkina Faso	Congo
Azores	Burma	Czech Republic
Bahrain**	Cameroon	Diego Garcia
Egypt**	Lesotho	Senegal
Estonia	Liberia	Sierra Leone
Ethiopia	Libya	South Africa
Gabon	Lithuania	Sri Lanka
Gambia	Madagascar	Sudan
Georgia		Swaziland
Ghana	Malawi	Syria
Gibraltar	Mali	Tajikistan
Guinea	Mauritania	Tanzania
Hungary	Moldova	Togo
Iran	Morocco	Tunisia
Iraq	Mozambique	Turkmenistan
Israel*	Niger	United Arab
Ivory Coast	Nigeria	Emirates**
Jordan	Oman	Yemen
Kazakhstan	Pakistan	Zaire
Kenya	Poland	Zambia
Kuwait**	Qatar	Zimbabwe
Kyrgyzstan	Romania	Uganda
Latvia	Russian Federation*	Ukraine
Lebanon**	Saudi Arabia**	Uzbekistan

Pacific Ocean Region

American Samoa	Japan*	Philippines
Australia*	Kiribati	
Brunei	Korea (South)*	Saipan
China (Peoples Rep)*	Marshall Islands	Singapore*
Christmas Is.	Micronesia, Fed. States	Solomon Islands
Cook Island	Malaysia*	Sri Lanka
	Mariana Islands	Taiwan*
Fiji Islands	Nauru	Thailand
French Polynesia	New Caledonia	Tonga
Guam	New Guinea	
Hong Kong*	New Zealand	Vanuatu
India*	Palau	Western Samoa
Indonesia*	Papua New Guinea	

APPENDIX B
COUNTRIES TO BE SEERVED VIA PAS SATELLITES (NONINTERCONNECTE)

One 64-kbps voice-grade circuit, via the PAS-1 satellite, except one 1.544 if marked by a *, to each of the following points:

Ku-band Countries

Albania
Anguilla
Armenia
Austria
Azerbaijan
Bahamas
Belarus
Belgium
Bermuda
Bosnia-Herzegovenia
Bulgaria
British Virgin Is.
Cayman Islands
Croatia
Czech Republic
Denmark
Estonia
France
Georgia
Germany
Greece
Hungary
Ireland
Italy
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Luzembourg
TFYR of Macedonia
Moldova
Monaco
Montserrat
Netherlands
Poland
Portugal
Romania
Russian Federation
Serbia & Montenegro
Slovakia
Slovenia
Spain
Sweden
Switzerland
Tajikistan
Turkmenistan
Turks & Caicos Is.
Ukraine
United Kingdom
Uzbekistan

C-band Countries

Anguilla
Antigua
Argentina*
Aruba
Bahamas
Barbados
Barbuda
Belize
Bermuda
Bolivia
Brazil*
British Virgin Is.
Cayman Islands
Chile*
Colombia*
Costa Rica
Dominica
Dominican Republic
Ecuador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Mexico*
Montserrat
Netherlands Antilles
Panama*
Paraguay
Peru
St. Christopher & Nevis
St. Lucia
St. Vincent & the Grenadines
Suriname
Trinidad & Tobago
Turks & Caicos Is.
Uruguay
Venezuela*

COUNTRIES TO BE SERVED VIA PAS SATELLITES (INTERCONNECTED)

Up to six 64-kbps voice-grade circuits to each of the following points, except one 1.544 Mbps circuit to those points marked with a *:

PAS-1 C-band Countries

Bahamas	Dominican Republic*	Panama*
Costa Rica*	Netherlands Antilles	Peru

PAS-1 Ku-band Countries

Albania	Georgia	Portugal
Armenia	Hungary	Romania
Azerbaijan	Kazakhstan	Russian Fed.
Bahamas	Kyrgyzstan	Somalia
Belarus	Latvia	Tajikistan
Bosnia-Herzegovenia	Lithuania	Turkmenistan
Bulgaria	Moldova	Ukraine
Czech Republic	Poland	United Kingdom*
Estonia		Uzbekistan

PAS-2

United Kingdom

PAS-4

Australia
Hong Kong
New Zealand

APPENDIX C
COUNTRIES TO BE SERVED VIA TDRS SATELLITES

One 64-kbps voice-grade circuit to each of the following points, not interconnected with the public switched network:

TDRS-41

Austria
Bahamas
Belgium
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
Turkey
United Kingdom

TDRS-174

Hong Kong
Mexico
Philippines

Up to six 64-kbps voice-grade circuits to each of the following points, interconnected with the public switched network:

TDRS-41	TDRS-174
United Kingdom	Hong Kong

APPENDIX D
COUNTRIES TO BE SERVED VIA THE ORION F1 SATELLITE

One 64-kbps voice-grade circuit to each of the following points, not interconnected with the public switched network:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Norway
Netherlands
United Kingdom
Poland
Sweden

Up to six 64-kbps voice-circuits to each of the following points, interconnected with the public switched network:

Germany
Ireland
Netherlands
Poland
Sweden

APPENDIX E
COUNTRIES TO BE SERVED VIA AUTHORIZED U.S. DOMESTIC SATELLITES, MEXICAN MORELOS (AND SOLIDARIDAD) SATELLITES, AND ANIK SATELLITES

Anguilla	Domestic Satellites
Antigua and Barbuda	Domestic Satellites
Bahamas	Domestic Satellites
Barbados	Domestic Satellites
Belize	Domestic Satellites
Bermuda	Domestic Satellites
British Virgin Islands	Domestic Satellites
Canada	Domestic Satellites, ANIK
Cayman Islands	Domestic Satellites
Dominica	Domestic Satellites
Grenada	Domestic Satellites
Grenadines	Domestic Satellites
Mexico	DomSats, Morelos and Solidaridad
Montserrat	Domestic Satellites
Netherlands Antilles	Domestic Satellites
St. Kitts & Nevis	Domestic Satellites
St. Lucia	Domestic Satellites
St. Vincent	Domestic Satellites
Turks & Caicos	Domestic Satellites
Venezuela	Domestic Satellites

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-52

In the Matter of

Amendment of Section 73.202(b),	RM-8604
Table of Allotments,	
FM Broadcast Stations.	
(Roann, Indiana)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1995; Released: May 1, 1995

Comment Date: June 22, 1995
Reply Comment Date: July 7, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Roann Broadcasting ("petitioner") requesting the allotment of FM Channel 270A to Roann, Indiana, as that community's first local aural transmission service. Petitioner advises that it, or an entity of which it is a part of, will apply for Channel 270A if it is allotted to Roann.

2. A staff review of the proposal reveals that Channel 270A can be allotted to Roann consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules, provided the transmitter is located at least 1.1 kilometers (0.7 miles) north of the community at coordinates 40-55-18 and 85-55-30.[1] Additionally, as Roann is located within 320 kilometers (199 miles) of the Canadian border, the Commission must obtain the concurrence of that Government in the proposal.

3. In view of an interest having been expressed in providing a first local aural transmission service to Roann, Indiana, we will propose to allot Channel 270A to that community. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Roann, Indiana, as follows:

	Channel No.	
City	Present	Proposed
Roann, Indiana	--	270A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1995**, and reply comments on or before **July 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Matthew H. McCormick, Esq.
Reddy, Begley, Martin & McCormick
1001 - 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Petitioner proposes a transmitter site 2.3 kilometers (1.4 miles) northeast of the community at coordinates 40-55-54 and 85-54-58. However, in determining compliance with Section 73.207(b) of the Commission's Rules, if a new allotment proposal that is subject to competing applications requires a site restriction, the Commission will endeavor to impose the least restrictive site possible. *See Fort Myers, Florida*, 3 FCC Rcd 2671 (1988). It is not until the application stage that the actual availability of a particular site is demonstrated. *See West Palm Beach, Florida*, 3 FCC Rcd 5810 (1988).

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-51

In the Matter of

Amendment of Section 73.202(b),	RM-8591
Table of Allotments,	
FM Broadcast Stations.	
(Shingletown, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1995; Released: May 1, 1995

Comment Date: June 22, 1995
Reply Comment Date: July 7, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Mark C. Allen ("petitioner") requesting the allotment of Channel 232A to Shingletown, California, as that community's second local FM service. Petitioner stated his intention to apply for Channel 232A if it is allotted to Shingletown, as requested.

2. A staff review of the proposal reveals that Channel 232A can be allotted to Shingletown, California, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules without a site restriction at coordinates North Latitude 40-29-33 and West Longitude 121-53-17.

3. Since an interest has been expressed in providing a second local FM service to Shingletown, California, we will propose to allot Channel 232A to that community. Therefore, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Shingletown, California, as follows:

	Channel No.	
City	Present	Proposed
Shingletown, California	287C2	232A, 287C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1995**, and reply comments on or before **July 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, as follows:

Mark C. Allen
3745 McHale Way
Redding, CA 96001

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial

comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-53

In the Matter of

Amendment of Section 73.202(b), RM-8613
Table of Allotments,
FM Broadcast Stations.
(Eugene, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1995; Released: May 1, 1995

Comment Date: June 22, 1995
Reply Comment Date: July 7, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Conway Broadcasting ("petitioner") requesting the allotment of Channel 265A to Eugene, Oregon, as its fifth local FM service. Petitioner states that it will apply for the channel, if allotted.

Technical Summary

2. Channel 265A can be allotted to Eugene in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.1 kilometers (4.4 miles) southeast to avoid a short-spacing to the pending application (BPH-940708IZ) of Station KZUS-FM, Channel 264C2, Toledo, Oregon.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 265A to Eugene since an interest has been expressed in providing the community with an additional local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eugene, Oregon	233C, 241C, 250C, 256C	233C, 241C, 250C, 256C, 265A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1995**, and reply comments on or before **July 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lars Conway
Conway Broadcasting
4415 Fremont Avenue, South
Minneapolis, MN 55409
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 265A at Eugene, Oregon, are 44-00-52 North Latitude and 123-00-50 West Longitude. Petitioner proposed coordinates 44-01-24 North Latitude and 123-00-00 West Longitude which represents a site restriction of 7.6 kilometers (4.7 miles) southeast. However, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we will not protect petitioner's proposed site and instead advance a less restrictive site for the allotment of Channel 265A at Eugene.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-49

In the Matter of

Amendment of Section 73.202(b), RM-8558
Table of Allotments,
FM Broadcast Stations.
(Llano and Marble Falls, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 19, 1995; Released: May 1, 1995

Comment Date: June 22, 1995
Reply Comment Date: July 7, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Maxagrid Broadcasting Corporation ("petitioner"), licensee of Station KLKM(FM), Channel 284C3, Llano, Texas, proposing the substitution of Channel 285C3 for Channel 284C3, the reallotment of Channel 285C3 from Llano to Marble Falls, Texas, and the modification of petitioner's license to specify Marble Falls as Station KLKM(FM)'s community of license. Petitioner also proposes the allotment of Channel 242A at Llano, Texas. Petitioner states it will apply for Channel 285C3 at Marble Falls, if allotted.[1]

2. Petitioner seeks modification of Station KLKM(FM)'s license pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Petitioner contends that adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local aural transmission service to Marble Falls. In support of its proposal, petitioner states that Marble Falls is an incorporated city with a 1990 U.S. Census of 4,007 persons, while the city of Llano only has a population of 2,962 persons. Petitioner notes that Marble Falls is served by a Mayor, City Council, Chamber of Commerce, library, Post Office, independent school system, as well as police and fire departments.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. Our initial analysis of petitioner's proposal indicates that while it would provide a first local aural transmission service to Marble Falls, it also would deprive Llano of its sole local service, since Station KLKM(FM) is the only station licensed to the community. Although, petitioner suggests that Channel 242A could be allotted to Llano, this is not an equivalent substitution for three reasons. First, the Commission has specifically stated that the replacement of an operating station with a vacant allotment does not adequately cure the disruption of existing service to the public.[2] Second, whether Channel 242A could ultimately be allotted to Llano through a rule making proceeding is speculative. In this regard, petitioner does not state its intention to apply for Channel 242A at Llano. In order for the Commission to propose a change to the FM Table of Allotments, the proponent of an allotment proposal must site a clear intention to apply for the channel and indicate a willingness to construct a station. Absent such an expression of interest, the Commission will not propose the allotment of a channel. Third, if we were so inclined to allot Channel 242A, this does not negate the loss of service to a segment of Llano's population, as petitioner suggests to replace a Class C1 station at Llano with a Class A facility. Thus, we find that petitioner's proposal represents a request to remove the sole local commercial FM service from Llano.

4. Although the *Community of License MO&O* restricts the removal of a community's sole local broadcast service, that document also states that a waiver of the prohibition will be considered "in the rare circumstances where removal of a local service might serve the public interest." *Id.*, 5 FCC Rcd 7096. However, we do not believe that the public interest is served by removing a community's sole local transmission service merely to provide a first local transmission to another community. The reallotment proposal must serve the Commission's allotment priorities and polices.[3] In this case, petitioner simply maintains that adoption of its proposal would provide service to a larger community. In order to evaluate this proposal it is necessary to solicit more information. Therefore, we request that petitioner provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Channel 285C3 is allotted to Marble Falls. Petitioner should also indicate the number persons located in any white or grey areas that are created by the adoption of this proposal. The study should also indicate the number of reception services which are now available within the gain and loss areas. Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would flow from grant of this proposal.

5. Channel 285C3 can be allotted to Marble Falls, Texas, in compliance with the minimum distance separation requirements with a site restriction of 16.1 kilometers (10.0 miles) southeast to accommodate petitioner's desired trans-

[1] Petitioner advances the allotment of Channel 242A at Llano, Texas, as part of its reallotment proposal. However, petitioner has not expressed an interest in applying for Channel 242A at Llano, therefore, we will not propose the allotment of Channel 242A to the community.

[2] *See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990).

[3] The FM priorities are: (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982.

mitter site.[4] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional channel at Marble Falls. Since Marble Falls is located within 320 kilometers (199 Miles) of the U.S.-Mexican border, concurrence of the Mexican government has been requested.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Llano, Texas	284C3	--
Marble Falls, Texas	--	285C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 22, 1995**, and reply comments on or before **July 7, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Joseph McVeigh
Multinational Legal Services, P.C.
11 Dupont Circle
Suite 700
Washington, D.C. 20036
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2173. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

[4] The coordinates for Channel 285C3 at Marble Falls are North Latitude 30-26-45 and West Longitude 98-11-45.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

J.C. Bell, File Nos. BAL-941004GF
Case Trustee and Blakeney BALH-941004GG
Communications, Inc.
For Assignment of Licenses for
Stations WHSY-AM/FM,
Hattiesburg, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1995; Released: May 1, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) the applications of J.C. Bell, Chapter 7 Bankruptcy Case Trustee for Hub City Broadcasting, Inc., for assignment of licenses for stations WHSY-AM/FM, Hattiesburg, Mississippi ("WHSY-AM/FM")[1] to Blakeney Communications, Inc. ("Blakeney");[2] (ii) a Petition to Deny the assignment applications filed on November 17, 1994, by Design Media, Inc. ("Design Media");[3] (iii) oppositions filed by the proposed assignor and assignee; and (iv) WHSY-AM/FM's response to a staff letter of inquiry regarding the disposition of assets resulting from the proposed sale to Blakeney.

II. BACKGROUND

2. In its pleading, Design Media contends that WHSY-AM/FM and Blakeney's station, WBBN-FM, do not currently comply with the Commission's EEO Rules and policies. Design Media has based its analysis on WHSY-AM/FM's 1992-1993 Annual Employment Reports and WBBN-FM's 1992-1994 Annual Employment Reports. Design Media alleges that WHSY-AM/FM did not have a single minority on its staff in 1993. Additionally, Design Media asserts that the Annual Employment Reports for WHSY-AM/FM for the years 1992 and 1993 do not reflect employment of any Blacks, even though the stations are situated in a Metropolitan Statistical Area ("MSA") in which Blacks are the dominant minority and account for 25.3% of the labor force. In 1992, the stations reported employing one minority, an American Indian, a group which accounts for 0.1% of the station's labor force.[4] Design Media further alleges that, during the period March 1985 until April 1990, the assignee's station, WBBN-FM:[5] 1) had only four Black employees; 2) employed no more than one Black at the same time, except for a possible overlap in the employment of two Blacks who were employed as part-time weekend announcers in 1987; and 3) employed, at most, two Blacks full-time.[6] Design Media opposes the proposedassignment of WHSY-AM/FM based upon both licensees' past EEO records.

III. DISCUSSION

3. Design Media's allegations of deficiencies in Blakeney's employment of minorities at WBBN-FM, in both overall and upper-four job categories, do not raise a substantial or material question of fact sufficient to warrant a hearing or denial of the instant assignment applications. Regarding the declarations of Glen and Charles Musgrove, all of the specific contentions raised by these declarants concern acts which occurred at WBBN-FM during the previous license term, 1982 to 1989. Hence, we find that

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[1] Due to financial distress, the licensee of WHSY-AM/FM suspended operations in May 1994 and filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Southern District of Mississippi, Case Number 92-09137 HEG. Since May 1994, the station has not employed any staff. Pursuant to 11 U.S.C. § 701 of the Bankruptcy Code, J.C. Bell was appointed interim trustee for WHSY-AM/FM on May 17, 1994. J.C. Bell, by involuntary transfer of control, was approved by the Commission on August 31, 1994, to become licensee of WHSY-AM/FM (File Nos. BAL-940809GE and BALH-940809GF). On October 4, 1994, J.C. Bell filed the instant applications for the assignment of licenses for WHSY-AM/FM to Blakeney Communications, Inc.

[2] Blakeney is the licensee of WBBN-FM, Taylorsville, Mississippi.

[3] Design Media is the licensee of stations WQSI-AM/WNSL-FM in Laurel, Mississippi. WQSI-AM/WNSL-FM are direct competitors of WHSY-AM/FM and WBBN-FM. The stations compete for audience and revenue in the Laurel-Hattiesburg market.

[4] The Hattiesburg, MS, Metropolitan Statistical Area, in which the station is located, has a 48.1% female and 26.9% minority labor force (25.3% Black, 0.8% Hispanic, 0.7% Asian/Pacific Islander, 0.1% American Indian). In the 1990 Annual Employment Report, one Black (5.8%) and one American Indian (5,8%) are listed among 17 full-time employees and one American Indian (6.2%) was among 16 upper-level employees. In 1991 the station did not file an Annual Employment Report. In the 1992 report, one American Indian (1.8%) was listed among 15 full-time employees and that same American Indian (7.1%) was among 14 upper-level employees. In the 1993 Annual Employment Report, the licensee had no minorities among 13 overall employees and 12 upper-level employees.

[5] The listed allegations of acts and omissions by WBBN-FM from March 1985 to April 1990, were made by Glen and Charles Musgrove, former employees of WBBN-FM. Their declarations were submitted with Design Media's Petition to Deny.

[6] The Taylorsville, MS, Metropolitan Statistical Area, in which the station is located, has a 42.7% female and 18.1% minority labor force (17.6% Black, 0.2% Hispanic, 0.1% Asian/Pacific Islander and 0.2% American Indian). In the 1990 Annual Employment Report, one Black (7.6%) was among 13 full-time employees and that same Black (8.3%) was among 12 upper-level employees. In 1991 one Black was among 14 full-time employees and that same Black (8.3%) was among 12 upper-level employees. In the 1992 report, one Black (6.6%) was listed among 15 full-time employees and that same Black (7.1%) was among 13 upper-level employees. In the 1993 Annual Employment Report, one Black (7.1%) and one Asian/Pacific Islander (7.1%) were among 14 full-time employees and one Black (8.3%) and one Asian/Pacific Islander (8.3%) were among 12 upper-level employees. In the 1994 report, one Black (6.6%) and one Asian/Pacific Islander (6.6%) were listed among 15 full-time employees and that same Black (7.6%) and Asian/Pacific Islander (7.6%) were among 13 upper-level employees. Blakeney, in its Opposition to the Petition to Deny, stated that after filing its Form 395-B in 1994, it hired two Blacks in full-time professional positions.

these allegations have no bearing upon the assignment applications before us now. As to the employment profiles for WBBN-FM, the data indicate that the licensee has been just nominally below our processing guidelines for minorities in each of the past five years. Therefore, we do not find that Blakeney's current EEO record is such that it disqualifies Blakeney as a Commission licensee. We will review Blakeney's EEO program at renewal time, in keeping with the Commission's general practice of reviewing EEO programs at stations' renewal. Historically, in the context of an assignment proceeding, absent a compelling reason we do not consider such data to raise a question that would warrant further inquiry. *Cf. In Re Application of WWOR-TV, Inc.*, 6 FCC Rcd 6569, 6574 (1991); *Metromedia, Inc.*, 98 FCC 2d 300, 302 n.2 (1984), holding that it is ordinarily our policy to review licensees' EEO programs at renewal time, not when processing transfer applications. There is nothing in the materials submitted by Design Media that would cause us to now deviate from our usual practice. In this regard, we note Blakeney's claimed improvement in hiring, *supra* note 6.

4. Design Media's petition against the record of WHSY-AM/FM, the proposed assignor, does demonstrate a substantial employment profile disparity at the stations during the years 1992 and 1993. Although ordinarily such a disparity would potentially prompt a further staff inquiry, competing considerations here persuade us that grant of the applications without such further inquiry wouldbe consistent with the public interest. Specifically, the equitable considerations underlying the Commission's decision in *Second Thursday Corp.*, 22 FCC 2d 515, 516, *recon. granted*, 25 FCC 2d 112 (1970), are present here. As noted, WHSY-AM/FM is in bankruptcy and has suspended operations. Under these circumstances, the question is whether "the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the transfer applications or only minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *See Second Thursday*. The *Second Thursday* doctrine "accommodates the policies of federal bankruptcy law with those of the Communications Act." *See LaRose v. FCC*, 494 F.2d 1145, 1147 (D.C. Cir. 1974). Therefore, Commission staff sent a letter of inquiry to WHSY-AM/FM regarding the disposition of assets to creditors from the bankruptcy sale of the stations. WHSY-AM/FM's reply included a detailed list of creditors and the sworn affidavit of J.C. Bell, the bankruptcy case trustee for WHSY-AM/FM.[7] Mr. Bell states that all of the assets of the debtor estate, WHSY-AM/FM, were sold at a public sale, pursuant to the authority granted him by the United States Bankruptcy Court of the Southern District of Mississippi. Blakeney bid $450,000 for WHSY-AM/FM at the public sale. The sale is contingent upon the Commission's approval of the assignment applications. Furthermore, claims filed by creditors and outstanding judgments against WHSY-AM/FM total $469,276.92. Additionally, the equity owners of WHSY-AM/FM will not benefit in any way whatsoever from the sale of the stations' assets, nor will they participate in the stations' future operation. Thus, notwithstanding any alleged past EEO Rule violations at WHSY-AM/FM, we find that, because of equitable considerations in favor of innocent creditors, grant of the assignment applications is in the public interest.

IV. CONCLUSION

5. After reviewing all of the above, we find that the Petition to Deny filed by Design Media failed to show why grant of the assignments would be inconsistent with the public interest. Consequently, we will deny Design Media's Petition to Deny and, finding Blakeney fully qualified, we will grant the assignment applications.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[7] Design Media was served with a copy of the inquiry letter and permitted to reply to WHSY-AM/FM's response. No reply was filed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-42

In the Matter of

Digital Data Transmission Within the Video Portion of Television Broadcast Station Transmissions — RM-7567

NOTICE OF PROPOSED RULE MAKING

Adopted: April 10, 1995; Released: May 2, 1995

By the Commission:

Comments Due: June 23, 1995
Reply Comments Due: July 10, 1995

1. We are initiating this proceeding to determine how best to permit certain digital technologies to be integrated with the current television broadcast service. Specifically, we seek comment on what procedural and substantive rules, if any, we should establish regarding the transmission of ancillary digital data within the active video portion of broadcast television NTSC signals.[1]

BACKGROUND

2. Section 73.646 of the Commission's Rules allows the transmission, without prior Commission consent, of ancillary telecommunications services within the Vertical Blanking Interval (VBI) of television broadcast signals.[2] The VBI spans from Line 1 to Line 21, preceding the active video portion of the NTSC television signal. The Commission restricts ancillary signals to specific lines of the VBI, and, pursuant to Section 73.682(a)(23) of the Commission's Rules, ancillary signals must cause no observable degradation to any portion of the video or aural portions of the signals.

3. We have taken a different approach to ancillary transmissions within other portions of the television signal, such as the video portion. In this regard, we have generally not allowed the transmission of ancillary telecommunications services within the video portion of broadcast television signals without prior Commission consent.[3] The intent of this policy is to ensure the public's ability to receive over-the-air video broadcast transmissions of the highest quality made possible by the NTSC standard.

4. Recently, two general approaches have been proposed to the Commission for the transmission of digital data within the video portion of the television signal, each intended to be imperceptible to viewers. Both have been permitted on a limited basis.

5. One of the two methods replaces the transmitted video signal with digitally encoded information in a part of the picture not normally seen by viewers. Line 22, the first line of active video, is used for this purpose. Depending on the particular encoding method, a video display of line 22 would look like either stationary and flickering, or moving black and white or colored dots or dashes. However, as these visible effects of data encoding are located at the very top of the TV picture, they are seldom seen because all TV sets to some extent "overscan" the picture to ensure that the portion of the picture tube that is visible is completely filled with the picture. Without the overscan, the picture would appear with a narrow black border. To date, the Commission has authorized only line 22 for such activity, although in theory, digital signals could be concealed in the left or right edges of the picture, or at the bottom. In 1985, by letters from the Chief of the Mass Media Bureau, the Commission authorized the use of line-22 systems developed by Telescan, Inc. and Ad Audit, Inc. for electronic verification of television broadcasts. These systems were designed to convey information about the date, time of day and length of commercial messages, as well as the presence of audio and video. Public comment on these systems, principally from broadcasters, generally did not oppose their authorization provided that: (1) broadcasters were advised of the presence of the signals in the source material provided to the stations and (2) the ultimate control and authority with respect to the signal transmission remained with individual television station licensees. The Commission made these terms a condition of the subsequent grants.

6. The other method of concealing digital signals distributes them throughout the visible picture. The amplitudes of such signals are kept sufficiently low (or they are confined to such a limited part of the normally emitted video spectrum bandwidth) that they are invisible to the viewer. Tests of such systems indicate that, with a proper selection of system parameters, no degradation to picture brightness, contrast, color or focus is perceptible to the viewer. One such system (the Special Data Transmission System or "SDTS") was proposed by the National Broadcasting Company (NBC). On March 3, 1992, the staff determined that the degradation caused to the television picture by NBC's SDTS was indiscernible, and that no further authorization was required for its use. (Letter to Jane E. Genster of March 3, 1992.) However, the data rate of the SDTS is only 240 bits per second, which is much less than is being considered in this proceeding and therefore the performance of the SDTS may not be indicative of the performance of a system using a much higher data rate.

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[1] NTSC is the acronym for the National Television Systems Committee, which developed the standards for the television broadcast system currently employed in the United States. An NTSC television picture consists of 525 lines, half transmitted during each of two interlaced fields. Each field contains 21 lines of vertical blanking interval, with the remainder of the lines containing picture information. *See* 47 C.F.R. §§ 73.681, 73.682.

[2] The VBI is the portion of the television broadcast signal that occurs at the beginning of each field. In the VBI, synchronizing pulses are transmitted and the electronic beam is turned off while it retraces from the bottom to the top of the screen, where the beam then begins the vertical scan of the next television picture. No picture information is transmitted during the VBI.

[3] *Public Notice*, FCC 70-387 (April 20, 1970), 22 FCC 2d 779 (1970).

WavePhore Request

7. By letter dated December 9, 1993, WavePhore, Inc. (WavePhore) requested a declaratory ruling that television broadcast licensees may, without prior Commission authorization, use WavePhore's "TVT1" system to transmit digital data signals.[4] This system (which is similar to the type described in the preceding paragraph) transmits digital data on a subcarrier within the standard 6.0 MHz NTSC television signal, between 3.9 MHz and 4.2 MHz above the visual carrier frequency, at an amplitude close to the video noise floor. The request states that the "TVT1" system transmits data at a rate of 384 Kbps, and may soon be able to send data at a rate of 1.544 Mbps. WavePhore asserts that its system generates no out-of-band spectral components.

8. WavePhore asserts that its system causes no visual degradation of the television picture as viewed on any commercial television set, because: (1) all commercial television tuners filter out that part of the spectrum that contains the data; (2) the amplitude of the data transmission is only several IRE units above the video noise floor and is therefore almost impossible to discern; (3) the data is injected into a narrow 300 kHz band that adds no significant component to the video noise floor when integrated and weighted over a 4.0 MHz video bandwidth; and (4) the data subcarrier's exact frequency and phase result in a "picket fence" data spectrum that is interleaved with respect to the comb structure of the chroma and lumina spectrum.

Initial Comments on WavePhore Request

9. On January 25, 1994, the staff issued a Public Notice inviting interested parties to address the assumptions, experimental data, and conclusions set forth in WavePhore's request.[5] Commenters were also asked to address whether any combination of intrachannel data transmission systems might cause undue interference to television broadcast signals.

10. Three parties submitted comments in response to the Public Notice. The Association for Maximum Service Television, Inc. (MSTV), the Consumer Electronics Group of the Electronic Industries Association (Electronics Group), and Radio Telecom & Technology, Inc. (RTT) all support the use of excess capacity within the video portion of the television broadcast signal to provide digital data services. However, they urge the Commission to exercise caution in determining how best to promote digital data transmission in conjunction with NTSC television signals. The commenters seek both to minimize interference with the video and audio portions of the signal and to encourage further innovation in digital data technology.

11. RTT supports WavePhore's specific request. It also requests the Commission to allow any party to superimpose signals on an existing television transmission without prior Commission authorization, as long as the signals do not degrade television broadcast reception in any discernible way. This absence of regulatory burden, RTT contends, would allow broadcasters and those associated with data transmission to compete most efficiently in the expanding "information superhighway." Further, RTT notes that WavePhore's proposal would use an encoder that performs two functions: (1) a slight low pass filtering and delay equalization of the video signal; and (2) linear addition of the data to the video. RTT asks whether, in the data insertion process, it would be permissible to filter out some of the video signal in order to insert the desired new data signal.

12. More specifically, citing Section 73.699, Figure 5, of the Commission's Rules, RTT notes that the bandpass characteristic of the standard transmitted video signal begins to roll off at frequencies above 4.2 MHz, reaching a negligible value just below the sound carrier centered at 4.5 MHz above the visual carrier frequency. Figure 11 of the Rule, RTT adds, indicates that the ideal receiver detector output rolls off at frequencies above 4.2 MHz. RTT states that WavePhore proposes to begin to roll off the video 0.3 MHz lower, at approximately 3.9 MHz, where its signal begins. According to RTT, this roll off could not only adversely affect the monochrome fidelity, but could also make the chroma subcarrier sidebands become even more asymmetric. Therefore, RTT asks whether a broadcaster may reshape the output of its transmitted video signal so as to delete any video that might otherwise interfere with the proposed new inserted data.

13. The other two commenters urge the Commission to exercise caution in determining the appropriate regulatory framework of the newly emerging digital data transmission industry. MSTV notes that other systems are being developed to transmit digital data, within both the video portion and other portions of the television broadcast signal. However, MSTV asserts that without a specific model as an industry standard for digital transmission within NTSC signals in general, the differing technologies that would be utilized could result in inter-system incompatibility, harming both consumers and the data transmitting industry. Thus, MSTV opines that adoption of a single industry standard would best facilitate the further development of a compatible digital data broadcasting system that would not harm the picture observable by viewers. MSTV adds that such action would be analogous to the Commission's recent determination that the development of another technical innovation, ghost-cancelling in television receivers, would be most efficiently facilitated by the adoption of a single industry technical standard.[6]

14. In addition, MSTV and the Electronics Group allude to the National Data Broadcasting Committee (the Committee), an entity formed in 1993 by the National Association of Broadcasters (NAB) and the Electronics Group. The Committee seeks to hasten the development of a voluntary national technical standard for high-speed data broadcasting using NTSC television signals as a delivery medium. MSTV and the Electronics Group assert that the Commission should rely on the Committee's findings and recommendations in setting an industry standard. Moreover, MSTV notes that the Commission has previously relied on the public sector to facilitate highly technical improvements in the television broadcast service. Specifically, it analogizes the work of this industry Committee to that of the FCC's Advisory Committee on Advanced Televi-

[4] WavePhore's petition is hereby incorporated into this proceeding. A copy of it and the associated comments have been placed in the docket file.

[5] *Public Notice*, DA 94-67 (January 25, 1994).

[6] *Report and Order* in MM Docket No. 92-305 (*Permissible Uses of the Vertical Blanking Interval of Broadcast Television Signals)* 8 FCC Rcd 3613 (1993).

sion Service, which has played an ongoing and critical role in the development of Advanced Television (ATV) technology.

15. The Electronics Group also requests the Commission to rely on the findings of the Committee and not enact any rule that would give one company an unfair competitive advantage in the introduction of broadcast data services. Specifically, the Electronics Group asserts that if WavePhore's request is granted, companies wishing to rapidly commence data transmission could use only WavePhore's technology, as it would be the only model not requiring prior Commission approval. At the same time, the commenter opposes the expansive rule proposed by RTT, which would allow any digital data transmission without prior Commission authorization, so long as there is no discernible effect on NTSC reception on the same or adjacent channels. Without the need for prior Commission authorization, the Electronic Group asks, who would determine whether there was "discernible" interference, and how would "discernible" be defined? Moreover, the Electronics Group expresses concern that such a rule would promote a race to create and utilize what would become a variety of incompatible systems. Such a reaction, the commenter warns, could ultimately deter investments by broadcasters, potential customers of the data services, equipment manufacturers, and consumers.

Nielsen Temporary Authority

16. On November 22, 1989, the staff granted A. C. Nielsen Company ("Nielsen") temporary, conditional authority to use line 22 of the active portion of the television video signal to transmit the Nielsen Automated Measurement of Lineup ("AMOL") system signal identification codes.[7] On March 15, 1990, Nielsen requested permanent authorization, after a period in which the compatibility of its AMOL system was tested with a functionally similar but technically different system employed by Airtrax. Several parties, including Airtrax, opposed Nielsen's request and successive pleadings were filed. By a letter dated May 1, 1990, the temporary authority was extended until the Commission acts on the request for permanent authority, or until the temporary authority is expressly withdrawn.[8] The Commission in this proceeding will determine whether Nielsen's request for permanent authority should be granted.

Airtrax Petition

17. As a result of the difficulties encountered in obtaining assurance that its commercial identification system would not be overwritten (and thus be rendered useless) by Nielsen's AMOL system, Airtrax filed a petition for rule making (RM-7567) on April 9, 1990, which requested the Commission to set standards for "special signal" use of line 22.[9] As justification for the rule making, Airtrax noted that even with the limited number of special signals currently authorized, disputes had arisen as to how to ensure compatibility of existing systems and to ensure that one entity's system would not preclude other users from access to line 22 at individual TV broadcast stations. It argued that the Commission had a statutory duty to promote the provision of new technologies and service to the public and that it should establish the ground rules by which competition may take place. Airtrax submitted that a rulemaking proceeding was necessary to achieve the following goals: maintain licensee discretion to broadcast special signals; ensure that the use of line 22 is broadcast-related; ensure that the special signal does not degrade the broadcast signal; prohibit users of line 22 from "overwriting" other users without permission from the TV station and the other users of line 22; and, develop technical standards for an "open" system which allows for alternative and multiple uses of line 22. Such action, Airtrax argued, would further the public interest by promoting the development of future technology and by encouraging efficient use of the broadcast spectrum.

Initial Comments on Airtrax Petition

18. NAB, commenting on the Airtrax petition, argued that use of line 22 should be limited since it falls within the active video area. It noted that trends in display technology and receiver design practice indicate that line 22 may become increasingly more viewable by consumers as time goes on, due to increasing use of underscanned displays to accommodate both computer-generated images and broadcast television signals. NAB concurred with Airtrax that more efficient use of the line 22 resource is a desirable goal. It suggested that data services be designed to be more resource-efficient by using a minimum amount of line time, partitioning line 22 into several "time slots" and inserting each line 22 signal the minimum number of times needed for its particular purpose. It also suggested shifting line 22 data to a line within the vertical blanking interval immediately prior to broadcast transmission. NAB did not take a position about whether a line 22 resource-maximizing effort should be pursued as an industry-only effort, or whether the Commission should take a mediating or regulatory role. Finally, NAB requested the Commission to protect other lines in the active video area from future requests for non-video uses.

19. MSTV opposed ancillary use of active video lines and particularly opposed administrative rules to permit more widespread use of line 22. As an alternative, it favored more efficient use of the vertical blanking interval by broadcasters, advertisers and other ancillary-service providers. It disagreed with Airtrax that line 22 issues should be addressed in a rulemaking proceeding, although it agreed that the Commission's current *ad hoc* process for line 22 authorization was not an effective means of providing due process to all interested parties. In lieu of acting favorably upon the Airtrax petition, MSTV encouraged the Commission to consider the merits of adopting new rules to protect the active video lines from ancillary uses.

20. Nielsen filed an opposition to petition for rule making and motion to dismiss in response to the Airtrax petition. Nielsen argued that the actions Airtrax advocated were unnecessary and that if standards for compatibility among line 22 signals and coordination among line 22 users became necessary, the industry could develop them

[7] Letter to Grier C. Raclin dated November 22, 1989. Nielsen's initial request for temporary authorization and subsequent request for permanent authorization of its AMOL system are hereby incorporated into this proceeding. Copies have been placed in the docket file.

[8] Letter to Grier C. Raclin dated May 1, 1990.

[9] *Public Notice*, Report No. 1833, released January 14, 1991. Airtrax's petition is hereby incorporated into this proceeding. A copy of it and the associated comments have been placed in the docket file.

without the Commission's regulatory involvement. Nielsen suggested that the Airtrax objectives of maintaining licensee discretion to broadcast special signals and to ensure that the broadcast signal is not degraded are basic conditions of authority granted under the Commission's existing *ad hoc* approval approach and do not require a rule making. Nielsen further suggested that normal business practices will prevent the "overwriting" of line 22 signals that Airtrax feared. Nielsen also claimed that the lack of a technical standard would foster innovation and development.

Yes! Entertainment Corporation Proposal

21. By letter of November 8, 1993, Yes! Entertainment Corporation ("Yes!") requested the Commission to permit television broadcasters to transmit a pulsed amplitude (7.5 to 100 IRE) signal beginning 9.1 microseconds after the beginning of the horizontal sync pulse and ending 10.36 microseconds after the beginning of the horizontal sync pulse (for a total pulse width of 1.26 microseconds) from line 22 through line 257 on each field.[10] At a rate of one pulse per line, 236 pulses per field, this would yield a data rate of 14,160 pulses per second, which could be coded to carry audio information. By means of equipment at a viewer's television receiver, this signal would be detected, processed and retransmitted from a set-top box to an external "TV Teddy" toy bear (a stuffed animal with a built-in receiver and speaker) for the purpose of making it "talk." Yes! indicates that there would be no visible degradation of received video because the affected portion of each scanning line is in an "overscanned" area.

22. Lastly (with respect to newer digital data transmission technologies), on January 19, 1995, the staff authorized Station WWOR-TV in Secaucus, New Jersey, to conduct tests of a data transmission technology developed by Digideck, Inc. (Digideck) called "D-Channel."[11] This system, like that of WavePhore, operates in the active video part of the TV spectrum and is represented as being imperceptible to viewers. Specifically, it adds a constant carrier level, quadrature phase-shifted (QPSK) data signal to the vestigial sideband (VSB) region of the video signal. The data carrier is placed 1 MHz below the picture carrier at a level between -30 and -36 dB relative to the video carrier at peak of sync. Data throughput is said to be 525,000 bps. A potential drawback of this system is that it operates near the edge of the television channel spectrum and it is possible that at higher injection levels, a slight increase in interference (on the order of 1 dB) to the lower adjacent channel may result.

DISCUSSION

23. We agree with those commenters who argue that the Commission should proceed with caution in this area. Like ancillary transmissions within other portions of the NTSC signal, digital data transmission within the video portion of broadcast television station signals is a communications tool that could expand and enhance the use of existing spectrum. However, it is important to create a regulatory framework that protects the quality of the NTSC television picture.

24. In light of the above two goals, we believe that we do not yet have sufficient information upon which to act on the requests from Yes! and WavePhore. Both requests raise significant questions pertaining to potential use for other purposes and technical compatibility. We solicit additional information in order to ascertain the long-term impact our authorization of these or other potential systems (such as Digideck's) may have on broadcasters, the data transmitting industry, consumers, and others. We also solicit the information we need to reach a conclusion on the Airtrax proposal for regulation of the use of line 22.

Licensee responsibility

25. Currently, television licensees must exercise control over all ancillary communications within the VBI and retain the responsibility to reject any material they deem unsuitable.[12] This responsibility also has been a condition of our authorization of line 22 data transmission systems. We see no reason to depart from this policy for data transmission within the video portion of the TV signal. We note that digital data signals can be inserted into the television signal "upstream" from the licensee's transmitter (after the baseband video signal has been created but before it has been supplied to the broadcaster who will actually transmit it). We are concerned that licensees continue to have effective control over such transmissions, and seek comment as to the appropriate regulatory mechanisms to guarantee such control.

26. Generally, we propose that licensees be allowed to transmit acceptable data signals without prior Commission authority or notification but not be allowed to relinquish to the data or program supplier the right to delete the data. We expect a licensee to be notified of any upstream data insertion in programming supplied to it unless the presence of the data is readily detectable. We further propose that a licensee be required to maintain a copy at the station of any contract regarding ancillary data transmissions within the video, as we currently require for data transmissions in the VBI.[13]

27. With the possibility that other manufacturers will want to employ different schemes for their own products or services, a substantial demand for such "hidden video spectrum" could develop, potentially posing difficult system compatibility problems. Our "licensee is responsible" approach gives the broadcaster the flexibility to choose among clearly mutually-exclusive uses. However, we are concerned that newly-developed systems might be incompatible with systems already in use without that fact being obvious to the broadcaster. It is also possible that while a single system's digital data insertions on a particular video signal would cause no discernible degradation to reception of the TV signal by itself, a combination of transmissions could have destructive cumulative effects. We seek comment on how to be certain that broadcasters and users are aware of such cumulative effects and also on how, if at all, such incompatibilities could harm consumers, broadcasters, or the data delivery industry. We also solicit comment on

[10] Yes! Entertainment Corporation's letter of request is hereby incorporated into this proceeding. A copy of it has been placed in the docket file.

[11] Letter to WWOR-TV, Inc. from Barbara A. Kreisman dated January 19, 1995.

[12] 47 C.F.R. § 73.646(d).

[13] 47 C.F.R. § 73.3613(e).

whether we should leave the resolution of questions concerning system compatibility and the impact of cumulative effects on the video signal to presumably informed broadcasters or prescribe compatibility standards and insertion limits by regulation.

Overscan vs. sub-video

28. There are two fundamentally different methods employed to prevent the inserted data from being discernable to viewers. In this proceeding, we will refer to them as "overscan" technology, where data is inserted at the top, bottom, right or left edge of the picture and "sub-video" technology, where data is inserted in a manner that could affect regularly viewable portions of the TV picture but would still not be detectable by the ordinary viewer. Line-22 uses and the Yes! proposal are examples of the "overscan" approach. WavePhore's and Digideck's systems use the "sub-video" approach. We seek comments to explore two aspects of these different approaches: discernable degradation and broadcasters' ability to delete the data.

Discernable degradation

29. Our current policy generally does not allow any use of the video portion of the TV signal for ancillary purposes if the picture or sound would be adversely affected in a manner that is discernable by viewers. We propose to continue to require that' broadcasters not be allowed to use any digital data transmission system (or combination of such systems) that would perceptibly degrade the video signal.

30. We note, however, that over the last twenty-five years (as solid state technology replaced vacuum tube technology), the amount of "overscan" used in television receivers has decreased from about five percent to a significantly smaller value, perhaps to less than two percent. We ask for comment on whether further reductions in overscan might result in signals in "overscan" areas becoming discernible to viewers in the future. The visibility of "overscan" data also may increase as multi-function video display devices increase their penetration in homes.[14] We seek comment on whether "overscan" technologies are visible on standard TVs and VCR recordings when "picture-in-picture" modes of viewing are invoked or will be more visible in the future when a TV signal is displayed as a "window" on a computer terminal graphics display. If development of these methods of television video display suggests that continuing use of "overscan" data transmission technology could create problems as the previously hidden information becomes visible on the screen, we request comment on whether "overscan" technologies should be phased out in favor of more subtle, less intrusive methods of data transmission. We seek comment on this issue and on a timetable for phasing out use of such systems, should we conclude to do so.

31. The picture degradation that results from sub-video methods of data transmission appears to be much more difficult to define and to detect. We seek comment on whether there is some method by which such picture degradation or "distortion" can be objectively measured and on whether there is some limit which should not be exceeded. We are also concerned about the filtering issue raised by RTT and seek comments on the extent, if at all, we should permit alteration of the video signal or the video bandpass characteristics to permit the insertion of data. Any further information on the potential for Digideck's D-Channel system to cause adjacent channel interference also is requested. Finally, we ask whether some types of receivers (such as the computer monitors mentioned in the preceding paragraph) might be more prone to showing degradation caused by any method of sub-video data transmission.

Broadcasters' ability to delete the data

32. As mentioned above, licensees must maintain control over all aspects of their signal, including data transmissions within the video. This means they must retain the right to reject any material they deem unsuitable. We seek comment on whether an ability to reject the entire program should be considered to satisfy this obligation or if any acceptable data insertion method must allow the broadcaster the option of stripping out the data.

33. "Overscan" data signals are limited to specific places in the picture and are easily deleted by the licensee. While the actual original picture content is lost when the data is inserted, it can be replaced either by a solid line (which would reduce the size of the picture slightly by adding to the border) or by duplicating the adjacent picture elements (for example, sending line 23 content on line 22, as well), making any picture degradation very difficult to detect or observe. We seek comment on what would happen to the picture if the licensee deletes sub-video data, if the licensee replaces sub-video data, and if multiple occurrences of such deletions or replacements take place. We are concerned that individually insignificant degradations to the picture could become cumulative, noticeable, and objectionable.

Standards

34. We wish to encourage the use of television signals for ancillary data transmission and to permit new technological developments. We seek comment on whether special rules should be applied to digital data transmissions that are directed to the general public. In that situation, adopting a standard might be essential to incorporating the appropriate decoding circuitry into future television receivers. If digital data transmissions were intended to be directed only to specific subscribers with specialized equipment, there may be less need to adopt a standard, although some process would be needed to assess degradation of the program video or audio caused by the data transmission method.

35. While we are seeking comments now to expedite resolution of this proceeding and to gain information that can assist any interim decisions we may make, we intend also to consider the work of the National Data Broadcasting Committee when we adopt a final decision.[15] If the Committee submits a recommendation to the Commission after comments are due, we intend to provide notice of that recommendation and to solicit public comment on it. We have successfully relied on similar industry groups in the past. Specifically, we note the success of the National Television Systems Committee, an industry group estab-

[14] *See* NAB comments on the Airtrax petition at para. 18, *supra*.

[15] *See* para. 14, *supra*.

lished in 1940 to develop technical standards for television broadcasts. The standard proposed by the industry and adopted by the Commission has served the nation's needs for half a century. As it continues its work, we encourage the Committee to take into consideration the many issues raised in this *Notice*, so as to formulate the most flexible and potentially useful method or methods of data transmission possible.

36. We also seek comments on whether there are limitations that we should impose on a technical standard developed by industry. For example, should a portion of a sub-video data transmission system's capacity be reserved for current line 22-type uses (which have not been intended for use by the general public)? Should any additional portions of its capacity be reserved for communications that would be targeted toward specific users (such as the Yes! proposal for its "TV Teddy" toy)? We request comment on whether that kind of application requires a specifically dedicated portion of the data signal instead of extracting needed information from a more general digital data signal. In sum, we ask whether any system that may be recommended as a standard must be "partitioned by use" at the time of its possible adoption or whether its design permits its adaptation to potential future uses on a flexible or dynamic basis. This question should also be considered in relation to digital signal decoders that might be used by the general public, either as an optional accessory provided on certain models of televisions or as some kind of external converter.

37. We seek comment on how our rules should reflect the industry standards. The options range from our continuing to authorize such transmissions on an *ad hoc* basis to our adopting a comprehensive set of rules defining and regulating permissible transmissions. We request comment on adopting rules analogous to those that govern multichannel television sound.[16] There, an industry committee evaluated the technology and recommended a standard. Our rules refer to the standard, which is also published in a Bulletin issued by our Office of Engineering and Technology, but are only designed to protect receivers designed to the standard from signals to which they would respond incorrectly.

38. Pending the Committee's completion of its work, we seek comments on whether we should consider the near-term authorization of individual methods of such transmission on an *ad hoc* basis. We would expect technical conflicts between users to be resolved by the individual licensees, but request comments on whether Commission involvement or guidance is necessary to focus licensee decisions on the public interest. Commenters are invited to address how we could resolve questions of picture or sound degradation.

Non-technical aspects

39. While the digital data transmission technology discussed above represents a significant increase over the current information-handling capacity provided by VBI technology, we propose that the policies currently contained in Sections 73.646 (which sets forth the rules currently applicable to non-broadcast services provided in the VBI) and 73.667 (TV subsidiary communications services) be extended to include non-broadcast use of overscan and sub-video data transmission technologies.

40. However, lines in the VBI are also used for broadcast and broadcast-related services. Line 21[17] is used for closed-captioning (text depiction of picture content) and for text mode data and extended data service information (the content of the latter is not regulated and may include any kind of information the broadcaster believes would serve the public interest). Line 17,[18] reserved for the use of the broadcast-related ghost-cancelling reference signal, is being used by many newer NTSC television receivers to improve picture quality. Accordingly, consistent with the inference made in paragraphs 34-36, *supra*, concerning transmissions directed to the general public, we propose to permit broadcast and broadcast-related use of sub-video data transmission technology and ask for comment on this proposal.

41. This *Notice* was formulated in response to the referenced pending petitions and is consistent with the Commission's general policy to foster more efficient use of spectrum and improve the diversity and quality of the telecommunications services available to the public. As a final matter, given the pendency of proposals to replace the current NTSC transmission standard,[19] we ask whether by further enhancing NTSC television in the manner described herein the Commission would provide a disincentive for the public to readily accept and upgrade to the digital service that we expect will be introduced in the near future. Similarly, we request comment on the extent to which enhancing NTSC service in the manner described herein could slow or create a disincentive to the recovery of the spectrum currently used by NTSC stations, as discussed in the advanced television proceeding.[20]

CONCLUSION

42. We seek comments on all of the issues raised in this *Notice* and any other related matters that commenting parties wish to bring to our attention. In particular, specific rule change proposals set forth and supported in initial comments would help to focus reply comments and therefore would expedite our consideration of these issues.

PROCEDURAL MATTERS

43. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **June 23, 1995,** and reply comments on or before **July 10, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You

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[16] *See* 47 C.F.R. § 73.682(c)(3), the definition of BTSC in 47 C.F.R. § 73.681, and the *Second Report and Order* in Docket No. 21323, FCC 84-116, released April 23, 1984, 55 RR 2d 1642, 1984, 49 Fed. Reg. 18100, April 27, 1984.

[17] *See* 47 C.F.R. § 73.682(a)(22)(i).

[18] *See* 47 C.F.R. § 73.682(a)(21)(iv).

[19] *See Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 6924 (1992).

[20] *See Second Report and Order/Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 3340 (1992) and *Second Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 7 FCC Rcd 5376 (1992).

should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, room 239, at the Federal Communications Commission, 1919 M Street, N. W., Washington, DC 20554.

44. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

45. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the attached Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

46. Authority for the proposed amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

47. For further information, please contact Paul Gordon at (202) 776-1653 or James E. McNally, Jr. at (202) 418-2190.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

I. Reason for Action

In recent years, a number of requests have been submitted to the Commission concerning systems for embedding digital data within television video signals. These proposals raise important questions about how embedded data systems could be accommodated, concerns over the extent to which broadcasters' control over their signals may be impaired or lost, and to what degree embedding multiple digital signals in the television picture may result in discernable picture degradation.

II. Objectives of the Action

The purpose of this proceeding is to develop policies and rules defining the respective rights and responsibilities of broadcast licensees and persons wishing to provide different types of digital information service, to explore the potential uses of such digital technology, to determine to what extent different systems may be compatible, to determine whether a national technical standard is necessary for the provision of such service, and to determine the probable impact of such service on the quality of primary television service.

III. Legal Basis

Authority for the actions proposed in this Notice may be found in Sections 4(i) and 303 of the Communications act of 1934, as amended, 47 U.S.C. 154 and 303.

IV. Reporting, recordkeeping and other compliance requirements

Policies adopted in this proceeding could lead to increased record-keeping requirements being imposed on broadcast licensees and/or providers of digital information service. If such requirements are imposed, they would probably take the form of such entities being required to maintain copies of contracts relating to the provision of such service and making them available to the Commission upon request.

V. Federal rules which overlap, duplicate or conflict with these rules.

None.

VI. Description, potential impact and number of small entities involved.

Approximately 10,000 licensees of television broadcast facilities of all types (Commercial and educational VHF and UHF stations, translators, boosters and Low Power TV stations) could be affected. The number of digital service providers affected would probably be much less.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives.

A decision to implement a national standard applicable to all digital information to be contained within the television picture, in conjunction with a decision as to the general types of information that could be provided, could greatly reduce or eliminate the compatibility problems related to the provision of digital data services and decrease the need for additional record-keeping requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-651

In the Matter of

Amendment of Section 73.202(b) RM-7544
Table of Allotments,
FM Broadcast Stations.
(Bald Knob and Clarendon,
Arizona)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 20, 1995; Released: May 2, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it an Application for Review filed by B&H Broadcasting Company ("B&H"), permittee of KXRC(FM). It requests review of the action taken pursuant to delegated authority by the Chief, Policy and Rules Division in this proceeding. The Chief, dismissed B&H's petition for reconsideration of the Division's action in *Memorandum Opinion and Order*, 7 FCC Rcd 6268 (1992), which substituted Channel 296C3 for Channel 296A at Bald Knob, Arkansas and modified the license issued to John Paul Capps for Station KKSY(FM) accordingly. The *MO&O* also substituted Channel 281A for Channel 297A at Clarendon, Arkansas and modified the construction permit issued to B&H for Station KXRC(FM) to accommodate the substitution at Bald Knob. Capps Radio filed an opposition to B&H's application for review. B&H subsequently filed a request for withdrawal of its application for review. We will grant B&H's request.[1]

2. IT IS ORDERED That the application for review filed by B&H Broadcasting Company IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

4. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] In accordance with §1.420(j) of the Commission's Rules, B&H included a declaration that it has not received nor will receive any consideration for the withdrawal of its Application for Review in excess of its legitimate and prudent expenses incurred in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-170

In the Matter of

Amendment of Section 73.202(b),	RM-8250
Table of Allotments,	RM-8332
FM Broadcast Stations.	
(Bemidji and Red Lake,	
Minnesota)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 20, 1995; Released: May 2, 1995

By the Chief, Allocations Branch:

1. In response to a petition filed by J. Thomas Lijewski ("Lijewski"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4276 (1993), seeking the allotment of FM Channel 238C1 at Bemidji, Minnesota. In response to the *Notice*, the Red Lake Band of Chippewa Indians ("Red Lake Band"), filed a counterproposal.[2] Lijewski filed comments supporting the allotment of Channel 238C1 at Bemidji. R. P. Broadcasting, Inc. ("R. P.") filed comments. Lijewski, R. P. and Red Lake Band filed reply comments.

2. Red Lake Band's counterproposal requests allotment of Channel 238C1 to Red Lake, Minnesota, located on the Red Lake Reservation, as that community's first local service. Red Lake Band believes that Bemidji is adequately served by various FM radio stations while Red Lake would receive its first local service with the allotment of Channel 238C1. In support of its proposal, Red Lake Band states that the Red Lake Reservation is currently unserved by any radio stations which air programs in the Ojibwe language, or which are directed to the unique interests and concerns of residents of Red Lake and Red Lake Reservation. Red Lake Band contends that although Red Lake is located on the Red Lake Reservation, the community possesses the necessary criteria to be considered a community for allotment purposes. According to Red Lake Band, Red Lake Reservation has a population of 6,000 people, its own municipal government which provides road maintenance, police and fire protection, trash collection, a public library and tribal courts. In addition, there are several schools, a hospital and a post office. Local businesses include a fish hatchery, saw mill, green house and a casino along with two commercial shopping centers.

3. R. P., licensee of Station WBJI(FM), Bemidji, Minnesota, opposes the allotment of Channel 238C1 at Bemidji. R. P. argues that, as an initial matter, the site proposed in the *Notice* is not suitable for use as a transmitter site. Its review indicates that the site is located within the town limits of Bemidji, in the center of Greenwood Cemetery and directly in the path of an airport runway. Further, while the *Notice* indicates the proposal will provide a third FM service to the community, R. P. contends Channel 238C1 will actually be a fifth FM service and that Station WBJI(FM), Blackduck, Minnesota, puts a city grade signal into Bemidji, while Station KLLZ-FM, Walker, Minnesota, puts at least a primary, if not a city grade coverage signal into Bemidji. Thus, R. P. believes Bemidji is well served and no need exists for another station serving the same audience, attempting to survive financially on the same limited pool of advertising revenues.

4. In reply comments, Lijewski continues to support the allotment of Channel 238C1 at Bemidji and argues that this proceeding is not an either or situation as depicted by Red Lake Band. Lijewski provided an engineering statement showing that Channel 231C1, an equivalent channel, may be allotted to Red Lake, allowing Channel 238C1 to be allotted to Bemidji. Lijewski contends that this solution will avoid a comparative analysis. In response to R. P.'s concerns over the site for Channel 238C1, Lijewski states that the site specified in the *Notice* is a theoretical site, in this case the city reference coordinates, and not necessarily the exact site that will be specified by applicants for the channel. According to Lijewski, there are approximately 4,000 square kilometers in which to place the proposed Bemidji station, including the existing tower utilized by Station KAWE(TV) and KCRB(FM). Therefore, R. P.'s claim that no suitable site exists, is misplaced and incorrect. Finally, Lijewski believes that R. P.'s economic arguments are misplaced at the rule making stage and should be disregarded.

5. R. P. filed reply comments stating its support for allotment of Channel 238C1 at Red Lake on the Red Lake Reservation. According to R. P., Bemidji enjoys a plethora of radio service while Red Lake and the Red Lake Reservation have no local service. Moreover, allotting a channel to Red Lake, as opposed to Bemidji, would be preferable from a competitive point of view. R. P. contends that allotment of the channel to Red Lake will serve a separate and distinct audience and not simply add another channel to Bemidji.

6. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of Channel 238C1 at Bemidji, Minnesota. Channel 238C1 can be allotted to Bemidji without a site restriction.[3] In response to R. P.'s concern over the proposed site for Channel 238C1, we note that the Commission endeavors to impose the least restrictive theoretical site from the intended city of license in rule making proceedings involving new allotments. Although that site must be fully spaced and provide city grade coverage to the community, it is only a theoretical site. Therefore, R. P.'s concerns are more appropriately addressed at the application stage where exact sites are known. R. P. also voiced concerns over competition in the Bemidji area.[4] R. P.'s

[1] The Community of Red Lake has been added to the caption.
[2] Public Notice of the counterproposal was given on September 15, 1993, Report No. 1965 (RM-8332).
[3] The coordinates for Channel 238C1 at Bemidji are 47-28-49 and 94-52-49.
[4] Stations KKBJ(AM), KBHP(AM), KBHP(FM) and KKBJ(FM)

concerns over increased competition in the Bemidji area raises issues which the Commission has already determined are not relevant in either a licensing or allotment context. *See FM Channel Assignments; Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989). Consequently, there is no basis under the current state of Commission precedent for consideration of these issues. In a related context, there is no Commission requirement for Lijewski or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Lijewski to apply for the Channel 238C1 allotment at Bemidji and construct the proposed facilities. In response to the counterproposal, we believe it would be in the public interest to allot a channel to Red Lake, Minnesota, on the Red Lake Reservation. Red Lake, Minnesota, is a Census Designated Place with a population of 1,068 people according to the 1990 U. S. Census. Red Lake has a post office, zip code and a hospital. Red Lake is located on the Red Lake Reservation which consists of 805,772 acres. Red Lake has a retail center, numerous businesses, nursing home and public works department. We believe there is sufficient indicia to conclude that Red Lake is a community for allotment purposes. It has an identifiable population grouping with businesses which identify themselves with the residents of Red Lake. *See Garrison, Kentucky*, 6 FCC Rcd 1428 (1991). A staff analysis has determined that Channel 231C1 can be allotted to Red Lake, Minnesota, in compliance with the Commission's spacing requirements.[5] Since Bemidji and Red Lake arelocated within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for both allotments. We believe one final matter requires comment. Even though the transmitter site for allotment purposes, for Red Lake, Minnesota, is located on the Red Lake Reservation, the Red Lake Band will have no greater rights to apply for Channel 231C1 than any other potential applicant(s). Therefore, the allotment will be made available for competing applications.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 16, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Bemidji, Minnesota	238C1, 266C1, 279C1
Red Lake, Minnesota	231C1

8. The window period for filing applications for Channel 238C1 at Bemidji and Channel 231C1 at Red Lake will open on **June 16, 1995**, and close on **July 17, 1995**.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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are licensed to Bemidji. Stations KCRB(FM), Channel 203C1, and Station KNBJ(FM), Channel 217C1, are licensed to Minnesota Public Radio at Bemidji. Bemidji State University operates Station KBSB(FM), Channel 209A, at Bemidji.

[5] The coordinates for Channel 231c1, Red Lake, Minnesota, are 47-55-30 and 95-19-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-267

In the Matter of

Amendment of the Amateur Service Rules to Extend Temporary Operating Authority to New Amateur Operators.	RM-8288

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 19, 1995; Released: May 2, 1995

By the Commission:

I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*Notice*)[1] in this proceeding, we proposed to amend the Commission's rules to provide temporary operating authority to a person who passes the examination for a new amateur operator license. For the reasons given herein, this *Memorandum Opinion and Order* terminates the proceeding.

II. BACKGROUND

2. An amateur operator who has passed the required examination, and who has submitted an application to the volunteer examiners (VEs) for a higher class of operator license, is authorized to operate his or her station using the greater privileges immediately. A Certificate of Successful Completion (CSCE) is the visible evidence of the examinee's operating authority until receipt of the license document. There is no comparable procedure for a successful examinee who does not already hold a license. To remedy this situation, the Western Carolina Amateur Radio Society/VEC, Inc. (Wescars) filed a petition for rule making (RM-8288). That petition provided the impetus for our proposal in this proceeding.

III. DISCUSSION

3. The commenters generally oppose the concept of a temporary operating authority for new amateur operators because they fear that it will be abused by persons who would fabricate false call signs and operate without any license. This is in direct contrast to those upgrading, as they already have an FCC-issued call sign. In addition, the commenters assert that the waiting period before receiving a license is not too long and affords a new licensee the opportunity to observe how to communicate in the amateur service.[2] In its comments, The American Radio Relay League, Inc. (ARRL) noted that electronic filing would save application processing time because the volunteer-examiner coordinators (VECs)[3] would enter the data from the applications they receive into an electronic format that can be sent at high speed over telephone lines to the Commission's processing facility. No manual reentering of data by the Commission's staff would be required. Because a license could be received in a relatively short time, less than two weeks, ARRL sees no need for a temporary license procedure.[4]

4. A number of other commenters also recommend that the Commission introduce electronic filing into the licensing process.[5] In an *Order* dated October 17, 1994,[6] the Commission, by the Chief, Private Radio Bureau, amended the amateur service rules to permit electronic filing by the VECs. Electronic filing has now been implemented on a voluntary basis by the VECs that handle ninety-five percent of the amateur service applications. It is significantly reducing the time required to receive and process applications for new amateur operator licenses. Time is conserved because there is no need for manual reentry of the data at our licensing facility. Finally, authorization to operate the amateur station now commences when our license processing facility grants the license by entering the appropriate data in the amateur service licensee data base. These procedures often allow a new amateur operator to begin operating an amateur station within a few days after the electronically-filed data is received by the Commission.

5. Accordingly, we conclude that the implementation of electronic filing of applications has made the proposed temporary operating authority unnecessary. Therefore, we decline to implement a temporary operating authority.

IV. ORDERING CLAUSES

6. For the reasons given herein, and pursuant to the authority contained in 47 U.S.C § 154(i), this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] 8 FCC Rcd 7916 (1993).

[2] *See*, for example, comments of Anthony Pelliccio at 1, Richard J. Kuster at 1, and James R. Bridgers at 1.

[3] There are eighteen VECs that coordinate the work of some 30,000 VEs who prepare and administer examinations for new and upgraded amateur operator licenses. As part of this process, the VECs receive and screen the application forms from the VEs and forward them to the Commission.

[4] Comments of ARRL at 7 and 8.

[5] *See* comments of Frank Pitman, Jr. at 1, Michael Kelly at 1, Douglas Cohen at 1, and Edwin Beach at 1.

[6] 9 FCC Rcd 6111 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

61 Licensee, Inc. CSR-4047-A
Hartford, CN

For Modification of
Station WTIC-TV's ADI)

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; Released: May 3, 1995

By the Cable Services Bureau:

INTRODUCTION

1. 61 Licensee, Inc., licensee of Station WTIC-TV (Ind., Channel 61), Hartford, Connecticut has filed a petition for special relief seeking to include within the Hartford-New Haven, Connecticut area of dominant influence (or "ADI"), to which the station is currently assigned, the Connecticut communities of Danbury, Bethel, and Ridgefield for must-carry purposes. WTIC-TV's petition is unopposed.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[5]

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[4] Certain counties are divided into more than one sampling unit, because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

[5] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[6]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis, rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, the operator is obliged to carry the affiliate from within the ADI of the station whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND PETITIONER'S ARGUMENTS

8. The three communities at issue are presently assigned to the New York, New York ADI, although they are all part of northern Fairfield County, Connecticut, which is on the southwestern border of the Hartford-New Haven ADI. According to the station, both Danbury and Bethel are encompassed by WTIC-TV's Principal City contour, while WTIC-TV's Grade A contour covers Ridgefield.

9. In support of its petition, WTIC-TV notes that it has been carried by Comcast Cablevision of Danbury ("Comcast"), the cable system serving these communities, since the station first went on the air in 1984,[10] and that WTIC-TV is the closest station to the Comcast system carrying Fox programming. In addition, the station notes that, while the system's principal headend is located 51.05 miles from New York City, it is only 48.53 miles from Hartford. According to WTIC-TV, a review of its news records for 1992 and 1993 reveals that it broadcast over 130 items during that time period about people and events in Fairfield County, including ten separate stories specifically concerning events in Danbury, Bethel, and Ridgefield. With respect to Danbury in particular, the station notes that it has focused specific public service efforts and advertising promotions on this area, including an extensive series of spot announcements for "Bob's Stores" during April, May and June, 1993, which featured a contest and the appearance of the star of the television series "Class of '96" during which people were encouraged to visit the store to obtain the star's autograph and simultaneously to contribute non-perishable food items to the United Way.

10. WTIC-TV also notes that there are only 299,800 television households in all of Fairfield County, which comprises only 4.4% of the total television households in the New York ADI. In addition, the combined population of Danbury, Bethel, and Ridgefield is only about 10% of the entire population of Fairfield County, so that viewers in those three communities constitute less than 0.5% of the total New York ADI viewers. Stations licensed to serve the New York market, therefore, cannot be expected to focus any significant attention on service to viewers served by Comcast's system. By comparison, however, the television households in Fairfield County equal 32.3% of the total number of households currently assigned to the Hartford-New Haven ADI, and WTIC-TV receives a significant portion of its viewership from Fairfield County as a whole. According to Nielsen's *1992 County/Coverage Study*, WTIC-TV had a 3% share of combined cable and non-cable viewing in the County, which was equal to, or higher than, the shares of five of the ten New York television stations reported. In one daypart WTIC-TV's total cable and non-cable viewing share was reported to be 5%.

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[6] 8 FCC Rcd at 2977 (emphasis in the original).
[7] *Id* and n.139.
[8] 47 C.F.R. §76.59.
[9] 8 FCC Rcd at 2981.
[10] Effective August 2, 1993, Comcast notified WTIC-TV that it had planned to discontinue the station's carriage; however according to its 1994 FCC Form 325a report, Comcast is still retransmitting WTIC-TV.

ANALYSIS AND DECISION

11. We shall grant WTIC-TV's request to include the communities of Danbury, Bethel, and Ridgefield within the Hartford-New Haven ADI for must-carry purposes. Initially, we note that WTIC-TV has demonstrated a history of carriage on the cable system serving these three communities since the station first began broadcasting in 1984. WTIC-TV also has shown that it provides coverage of and service to these communities, and that they are all encompassed by its Grade A or better contour. We have stated previously that this, alone, is sufficient to satisfy this factor.[11] With respect to the fourth factor, we recognize that WTIC-TV's audience shares are not the strongest factor in support of its petition.[12] We also recognize that this data is county data, rather than community-specific data, but we shall accept it as probative (although not conclusive) in cases of this type, absent evidence, which was not submitted herein, that it is not fairly reflective of viewing in the actual communities in question. When taken as a whole, however, we believe that the totality of factors, including WTIC-TV's long history of carriage as well as its Grade A coverage of the communities at issue, warrant grant of the requested waiver.

12. Insofar as the third factor is concerned, while WTIC-TV has not fully addressed the issue of whether other stations entitled to mandatory carriage by the cable system serving these three communities already provide news coverage of issues of concern to them, as well as carriage or coverage of sporting or other events of interest there, we do not believe that Congress intended this factor to operate as a bar to a station's ADI claim whenever other stations also could be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, because other stations do appear to serve the communities named by WTIC-TV, this enhancement factor does not appear to be applicable. WTIC-TV's showing on the other factors, however, is sufficient and, even absent enhancement under the third criterion, warrants grant of the relief requested. Therefore, for the purposes of determining mandatory signal carriage obligations, we shall consider the communities of Danbury, Bethel, and Ridgefield, Connecticut to be part of the Hartford-New Haven, Connecticut ADI, as well as part of the New York, New York ADI.

ORDER

13. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, (47 U.S.C. 534(h)(1)(C)) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), That the petition for special relief (CSR-4047-A), filed August 2, 1993 by 61 Licensee, Inc. IS GRANTED. WTIC-TV shall notify Comcast Cablevision of Danbury in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable system shall come into compliance with the applicable rules within sixty (60) days of such notification.

14. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[11] 8 FCC Rcd at 2977. *See*, paragraph 5, *supra*.

[12] The audience shares submitted by WTIC-TV are generally confirmed by those contained in Arbitron's 1993 report *Television County Coverage for Connecticut*. WTIC-TV had a 2% share and a 30% net weekly circulation among cable viewers, while it received a 1% share and a 10% net weekly circulation with non-cable viewers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Counterpoint Communications. Inc.
Licensee of Television Station
WTXX, Waterbury, Connecticut

CSR-3839-A

Petition for Special Relief to Add
Certain Communities to WTXX's
Television Market

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; **Released: May 3, 1995**

By the Cable Services Bureau:

INTRODUCTION

1. Counterpoint Communications, Inc., licensee of WTXX-TV, Channel 20, Waterbury, Connecticut, (hereinafter "WTXX") filed the captioned petition for special relief, to include a number of Fairfield County, Connecticut communities[1] within the Hartford-New Haven ADI for purposes of asserting signal carriage rights on cable systems serving those communities.[2] Cook Inlet Communications Corp., licensee of WTNH, New Haven, Connecticut, (hereinafter "WTNH") and Cablevision Systems of Southern Connecticut, L.P. and Cablevision of Connecticut, L.P. (collectively "Cablevision") filed opposition to this petition. WTXX submitted reply comments to these opposition.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[3] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[4] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[5] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[6]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and non-cable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

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[1] These communities are: Bridgeport and Fairfield (served by Cablevision of Southern Connecticut, L.P.); Danbury, Bethel and Ridgefield (Comcast Cablevision of Danbury); Fairfield County, Darien, Easton, Greenwich, New Canaan, Norwalk, Redding, Stamford, Weston, Westport and Wilton (Cablevision of Connecticut, L.P.); Brookfield, Monroe, New Fairfield, Newtown, Sherman, Stratford and Trumbull (Housatonic Cablevision Co.); and Shelton (Tele-Media Co. of Western Connecticut).

[2] WTXX also filed additional comments in support of its petition at the time opposition were due.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[5] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[6] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* non-cable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and non-cable homes, and significantly viewed surveys typically measure viewing only in non-cable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. WTXX is an independent television station licensed to Waterbury, Connecticut, which is part of the Hartford-New Haven area of dominant influence ("ADI"). Each of the communities that WTXX seeks to include is in Fairfield County, Connecticut, the only county in that state assigned to the New York ADI, rather than the Hartford-New Haven ADI.

9. According to petitioner, the station signed on-the-air on September 4, 1953. It was acquired by WTXX Communications in March 1993 and became a part-time affiliate of the Home Shopping Network at that time. While WTXX initially dedicated about 60% of its broadcast week to a home shopping format, that percentage of programming dropped to less than 50% on May 17, 1993, to ensure WTXX's continued cable carriage during the pendency of the Commission's rulemaking to determine whether such stations were entitled to must-carry status.[12]

10. WTXX states that each of the cable systems in question has carried its signal for at least ten years.[13] WTXX also includes a coverage map that shows that its station places a Grade B or better signal over all of Fairfield

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[8] 8 FCC Rcd at 2977 (emphasis in original).
[9] *Id.* and n.139.
[10] 47 C.F.R. §76.59.
[11] 8 FCC Rcd at 2981.
[12] Both the petitioner and opposition raise issues relating to WTXX-TV's rights of carriage due to its home shopping format. After WTXX filed its petition, the Commission determined that stations broadcasting shopping formats would be treated like any other commercial television station for must-carry purposes. See Report and Order in MM Docket 93-8 (Home Shopping Station Issues), 8 FCC Rcd 5321 (1993). In addition, WTXX incorporates in this petition a request for stay to prevent Storer Cable of New Haven from dropping its station because of its format. This request and the arguments regarding the status of home shopping stations are now moot and will not be considered any further in this analysis.
[13] WTXX notes a controversy associated with Cablevision's

County and a Grade A signal over most of the County's cable systems. It notes that the majority of Fairfield County lies within 35 miles of WTXX's city of license and, therefore, the station was considered local under the Commission's previous must-carry rules and is local for copyright compulsory license purposes. WTXX also asserts that it is considered significantly viewed in Fairfield County.

11. The petitioner further contends that it offers a diverse mix of programming of interest to viewers in Connecticut. In particular, it asserts that it is developing a nightly half-hour newscast that will focus on news impacting the state's residents. WTXX cites its acquisition of the exclusive Connecticut rights for the program, "NEWS AMERICA," which will provide an additional national news source beginning in the Fall of 1993.[14] WTXX claims that the New York stations do not provide adequate local service to Connecticut residents due to the size of the market and the small percentage of the total area that Fairfield County represents. WTXX also argues that as it adds more syndicated and original programming, it will look to Fairfield County advertisers for revenue. WTXX believes that it will attract these advertisers because its advertising time will be less expensive than that of the New York City stations.

12. WTNH and Cablevision, in separate oppositions, argue that the current WTXX is a different station than that which has been historically carried by the Fairfield County cable systems.[15] Cablevision maintains that there have been two WTXXs. Under theprevious owner, WTXX was a station that carried a variety of popular programming and the weekly "Connecticut Viewpoint"; today, the station is just a Home Shopping Network affiliate. As such, the parties argue that historical carriage should not be afforded much weight in considering this request due to the significant changes in programming since 1993.

13. With respect to local coverage or other service, WTNH argues that the significantly viewed status of WTXX is irrelevant since the historical data used to determine this status is outdated given the station's recent format change. WTNH and Cablevision note that WTXX describes its station's non-entertainment programming and programming of interest as generally applicable to all Connecticut residents; in their view, this description is insufficient and does not meet the requirement that parties provide information regarding the broadcast of county- or community-specific programming. Cablevision argues that petitioner provides no evidence that its programming currently addresses, or that the proposed newscast will address, issues specifically directed to Fairfield County viewers. Both opposing parties also note that the planned newscast will also be provided by WVIT, another station licensed to the Hartford-New Haven ADI and one that Cablevision indicates it will continue to carry assuming it receives retransmission consent.[16] While WTXX argues that the New York stations do not provide adequate programming of local interest for Fairfield County residents, WTNH and Cablevision contend that the petitioner fails to comment on the significant amount of Connecticut-oriented programming provided by the other stations licensed in the Hartford-New Haven ADI which are currently carried on the cable systems. Cablevision further asserts that its Fairfield County systems plan to continue carriage of these other stations, which not only provide programs of general state interest, but also broadcast some programming of specific interest to Fairfield County such as University of Connecticut sports, public affairs, local talk shows and state lottery drawings.[17] Finally, these parties state that WTXX's request should be rejected because the petitioner has failed to submit viewing data beyond a reference to its significantly viewed status in Fairfield County.[18]

14. In reply, WTXX contends that its affiliation with the Home Shopping Network and its change of ownership does not render it ineligible for must-carry status. It repeats that WTXX-TV has been historically carried by the Fairfield County cable systems and places at least a Grade B signal over the affected communities. WTXX argues that because Cablevision admits that the historical carriage of the station was based on a long history of providing educational and informational programming, it therefore "meets the second and fourth prongs of the Section 614 test." In this submission, WTXX cites recent programming that it claims have "a direct local focus" and reiterates the public service aspect of its programming in terms of its interest to Connecticut state residents.

ANALYSIS AND DECISION

15. WTXX has justified modifying its ADI to include the Fairfield County communities named in the petition for special relief. At the outset, based on the general geography and market structures implicated, it is evident that the requested change would involve a preferable allocation of the area in question between the markets and would "better effectuate the purposes" of the applicable statutory provisions. The majority of Fairfield County communities are no more that 35 miles from Waterbury, CT, WTXX's city of license and the furthest Fairfield County community named in the petition is no more than 50 miles from

announcement that it was dropping all the Hartford-New Haven ADI stations from its Fairfield County cable system line-ups. At the time the petition was filed, however, Cablevision stated it would continue to carry all Hartford-New Haven ADI stations except WTXX. Subsequently, in its July 1 comments, WTXX states that it has retained carriage on all the named systems except Comcast Cablevision of Danbury.

[14] WTXX further notes that it has acquired the rights to broadcast several award winning shows which it plans to follow with locally-produced commentary programs. The petitioner names "TALE OF THREE CITIES" (a look at the turbulent lives of urban Americans) and "THE HERO" (a look at the issue of drunk driving) as examples of such programs it has already aired and "STORY OF A PEOPLE," "THE OTHER SIDE OF VICTORY" and "MENTAL SOUP" (a new teen educational program) planned for broadcast this year.

[15] Cablevision indicates that WTXX has been carried on its Norwalk system since August 1982 and its Bridgeport system since August 1983; this is consistent with the petitioner's claim to historical carriage on these systems.

[16] WTNH includes in its filing a story from the NEW HAVEN REGISTER (June 10, 1993 edition) regarding this matter.

[17] To support its statement, Cablevision submits Connecticut program guides for the week of April 24-30, 1993.

[18] In this regard, WTNH submits selected audience data that demonstrate that WTXX captures a limited audience in its own television market. The submitted data show that WTXX generally attains a 1 rating and between a 3 and 4 share for its weekday schedule in the Hartford-New Haven DMA (dominant market area), the Nielsen equivalent of the ADI. WTNH also shows that WTXX received a 2 share in Fairfield County prior to its format change.

Waterbury. Moreover, with the Hartford-New Haven ADI abutting Fairfield County to the south, WTXX appears closer to Fairfield County than stations licensed in the New York ADI. Turning to the factors specified in the 1992 Cable Act, we find that WTXX has sufficiently satisfied the statutory requirements with its local coverage element being particularly notable.

16. WTXX demonstrates that it meets the historical carriage requirement with respect to apparently all cable systems operating in Fairfield County. The fact that each of the cable operators has carried WTXX for at least 10 years signifies its ties to the Fairfield County communities. We do not agree with the opposition that the recent change in ownership and format negate the fact that the station has been traditionally carried by these cable operators. In particular, we note that, even when these changes took place, the systems generally did not drop the station.[19] We also conclude that WTXX satisfies the coverage element of the statutory test since all the named communities fall within this station's Grade B contour and most within its Grade A contour.[20] With regard to the content of WTXX's programming, the Commission found that home shopping formats are not incompatible with local appeal and recognize that such specialty programming traditionally has drawn smaller audiences. The Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[21]

17. As for viewing pattern data in cable and non-cable households, we note that the station has a 2 share and 30 net weekly circulation.[22] We find any arguments regarding WTXX's lack of ratings to be unpersuasive. We have previously recognized that stations with limited audiences, once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ." yet typically attract limited audiences.[23] The fact that specialty stations, and those akin to them such as home shopping stations, attract smaller audience shares, is properly taken into account in determining the equities concerning a station's right to cable carriage. In this instance, we believe that the audience share figure, while not the strongest factor, when taken as a whole with Fairfield County's geographic location, Grade B contour coverage and historical carriage, warrants a grant of the requested change.

18. With respect to the third statutory factor, we note that WTXX does not fully discuss the amount and kind of programmingp New York ADI stations provide to the Fairfield County communities. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities.

ORDER

19. In view of the foregoing, we find that grant of Counterpoint Communications, Inc.'s petition is in the public interest.

20. Accordingly, IT IS ORDERED, pursuant to Section 614(c) of the Communications Act of 1934, as amended (47 U.S.C. 534) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed May 11, 1993, by WTXX Communications, Inc., IS GRANTED.

21. IT IS FURTHER ORDERED that WTXX's television market is modified to include all Fairfield County communities served by Cablevision of Connecticut, Cablevision of Southern Connecticut, Comcast Cablevision of Danbury, Tele-Media of Western Connecticut, and Crown Houstatonic Cablevision. The station shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

22. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[19] The ownership change occurred while our proceeding to implement the must-carry provisions of the Cable Act was pending. However, since WTXX was licensed to a community outside the ADI to which Fairfield County is assigned, the cable operators were aware that the station would not be considered local even under the new rules since the market definition was derived from the 1992 Cable Act.

[20] *See* 8 FCC Rcd at 2981.

[21] *See Home Shopping Station Issues*, 8 FCC Rcd 5321, 5327 (1993), *reconsideration pending*.

[22] *See* Arbitron's Television County Coverage for 1993. These data are county-based, rather than community-specific. However, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, such data are acceptable as probative, although not conclusive, in cases of this type.

[23] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chequamegon Telephone Cooperative, Inc.
and Maple Telephone Cooperative, Inc. AAD 94-124

Joint Petition for Waiver of the
Definition of "Study Area" Contained
in Part 36, Appendix-Glossary,
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1995; Released: May 3, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On September 23, 1994, Chequamegon Telephone Cooperative, Inc. ("Chequamegon") and Maple Telephone Cooperative, Inc. ("Maple") (collectively, "Petitioners") filed a joint petition for waiver ("Joint Petition") of the definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's rules. This waiver would allow Chequamegon to change its study area boundary to conform to its recently approved merger with Maple.[1] On October 25, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on Petitioners' request for waiver.[2] We received comments supporting the joint petition from three parties: the National Exchange Carrier Association, Inc. ("NECA"), the National Telephone Cooperative Association ("NTCA"), and the United States Telephone Association ("USTA"). In this order, we find that consolidating the Maple and Chequamegon study areas will serve the public interest, and we therefore grant Petitioners' request for waiver, as explained more fully below.

II. BACKGROUND

2. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area corresponds to a carrier's entire service territory within a state. Thus, carriers operating in more than one state typically have one study area for each state, and carriers operating in a single state typically have a single study area. Carriers perform jurisdictional separations at the study area level.[3] For jurisdictional separations purposes, the Commission adopted a rule freezing study area boundaries effective November 15, 1984.[4] The Commission took that action, in part, to ensure that local exchange carriers ("LECs") do not set up high-cost exchanges within their existing service territories as separate study areas to maximize high-cost support.[5] The study area freeze also prevents LECs from transferring exchanges among existing study areas to increase interstate revenue requirements and compensation. A LEC must apply to the Commission for a waiver of that rule if the LEC wishes to sell an exchange to another carrier, because such a transaction would have the effect of changing the study area boundaries.[6]

3. Waiver of commission rules is appropriate only if special circumstances warrant a deviation from the general rule[7] and such deviation will serve the public interest.[8] In evaluating petitions seeking a waiver of the rule freezing study area boundaries, the Commission employs a three-prong standard: first, that the change does not adversely affect the Universal Service Fund ("USF") support program; second, that the state commission(s) having regulatory authority does not object to the change; and third, that the public interest supports the change.[9] In evaluating whether grant of a waiver request would adversely affect the USF,[10] the Commission applies a "one percent" guideline to study area waiver requests filed after January 5, 1995.[11] This guideline does not apply in the instant case because Petitioners filed before that date.

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[1] On June 30, 1994, the Wisconsin Public Service Commission ("Wisconsin PSC") approved the merger between Chequamegon and Maple. *See* Wisconsin Public Service Commission Order, File Nos. 1070-TB-101 and 3330-TA-100 (Jun. 30, 1994) ("Wisconsin PSC Order").

[2] Public Notice, 9 FCC Rcd 6127 (Com. Car. Bur. 1994).

[3] The phrase "jurisdictional separations," or "separations," refers to the process of dividing costs, revenues, and expenses between a carrier's state and interstate operations. See generally 47 C.F.R. §§ 36.1-36.741.

[4] 47 C.F.R., Part 36, Appendix-Glossary, definition of "Study Area" (1993). See MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*1984 Joint Board Recommendation*), adopted by the Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*1985 Order Adopting Recommendation*). *See also* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*).

[5] See 1985 Order Adopting Recommendations, 50 Fed. Reg. 939, 940. Also see 1984 Joint Board Recommendation, 49 Fed. Reg. 48325, 48337.

[6] 47 C.F.R. Part 36, Appendix-Glossary. See also 47 C.F.R. § 1.3.

[7] Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir 1990).

[8] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir 1969).

[9] See US West Communication, Inc., and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Memorandum Opinion and Order, FCC 95-4, released Jan. 5, 1995, (*US West-Eagle Study Area Order*) at para. 5.

[10] *See Joint Board Recommended Decision*, 49 Fed. Reg. at 48337, para. 65. The Commission created the USF to preserve and promote universal service. See Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 96 FCC 2d 781 (1984). The USF allows LECs with high local loop plant costs to allocate a portion of those costs to the interstate jurisdiction, thus enabling the states to establish lower local exchange rates in study areas receiving such assistance. The amount of USF assistance a LEC receives depends on how much its average cost per loop exceeds the nationwide average. *See* 47 C.F.R. § 36.631.

[11] The Commission stated that no waiver of the rule freezing

III. PETITION

4. Petitioners seek a waiver of the rule freezing study area boundaries to permit them to consolidate Maple's study area with Chequamegon's study area, both of which are in rural Wisconsin. Chequamegon would be the surviving corporation. Maple is a LEC with one exchange serving approximately 325 access lines. Chequamegon is a LEC with 12 exchanges serving approximately 8,070 access lines. Both Chequamegon and Maple are cost companies for purposes of interstate access settlements.[12]

5. Petitioners estimate that this consolidation would result in a decrease of $23,000 in USF assistance, because the two study areas currently receive a combined total of $342,636 in USF support as separate entities and would receive $319,636 as a consolidated entity. Petitioners contend that, in light of the Wisconsin PSC's approval of Petitioners' corporate merger, the Commission should approve the study area waiver so interstate and intrastate reporting would be consistent. Petitioners further contend that the consolidation would promote the public interest because it would produce technical and administrative efficiencies benefiting subscribers. As an example of such efficiencies, Petitioners state that a single staff would be able to coordinate and perform installation, maintenance, customer service and administrative functions using common facilities and equipment. Petitioners estimate that such efficiencies would result in an overall cost savings of at least $70,000 per year.[13]

IV. DISCUSSION

6. The consolidation of study areas located within the same state, as Petitioners propose, is the type of study area reconfiguration that the Commission encourages.[14] Such a consolidation will likely result in reduced regulatory expenses both with respect to the intrastate and interstate jurisdictions. After the merger, regulators will need to scrutinize the operations of only one study area rather than two. Moreover, the consolidation proposed by Petitioners should result in significant administrative cost savings to Chequamegon. Because the jurisdictional separations of costs and revenues are based on cost studies performed at the study area level, Chequamegon will be able to eliminate one set of cost studies after reducing the two study areas to one. We expect that the Wisconsin PSC, which has approved the proposed consolidation, will ensure that those savings eventually will be passed on to local ratepayers through reduced local rates. Consequently, the consolidation should serve the public interest. Moreover, we have determined that the consolidation will not increase Petitioners' USF draw and thus will not adversely affect the USF program. Petitioners thus have demonstrated that a waiver of the rules freezing study areas is warranted. We therefore grant the Petition to permit Chequamegon to change its study area boundary to conform to its merger with Maple.

V. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c) and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of Chequamegon Telephone Cooperative, Inc. and Maple Telephone Cooperative, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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study area boundaries should result in an annual aggregate shift in USF assistance in an amount equal to or greater than one percent of the total USF, unless the parties can demonstrate extraordinary public interest benefit. The USF effect for the year must be computed on an annualized basis. To prevent carriers from evading this limitation by disaggregating a single large sale of exchanges into a series of smaller transactions that in the aggregate have the same effect on the USF, the Commission further requires that the "one percent" guideline be applied to all study area waivers granted to either carrier, as a purchaser or seller, pending completion of the current review of the USF program. In this context, the Commission defines the term "carrier" to include all affiliated carriers *(i.e.,* those carriers that are in common control, as the term "control" is defined in Section 32.9000 of the Commission's rules, 47 C.F.R. § 32.9000). See US West-Eagle Study Area Order at paras. 14-17.

[12] "Cost Companies" are those exchange carriers receiving compensation for the use of their facilities in originating and terminating interstate telecommunications services on the basis of their actual costs.

[13] Joint Petition at 4.

[14] *See generally* ALLTEL Service Corp., Petition for Waiver of the Definition of Study Area, Memorandum Opinion and Order, 9 FCC Rcd 4450, 4451, paras. 6-7 (Com. Car. Bur., 1994); ALLTEL Service Corp., Petition for Waiver of the Definition of Study Area, Memorandum Opinion and Order, 8 FCC Rcd 6411, 6411, para. 6 (Accounting & Audits Div., 1993); *Study Area Notice,* 5 FCC Rcd 5974, 5974-75, at paras. 6 and 17; *1984 Joint Board Recommendation,* 49 Fed. Reg. 48325, at para. 66; *1985 Order Adopting Recommendation,* 50 Fed. Reg. 939, at para. 1;

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NORTH BAY TELEVISION, INC. File No. BPCT-930715KI

For Reinstatement of Expired
Construction Permit for
Station KWOK(TV), Novato, California

ORDER

Adopted: April 19, 1995; Released: May 3, 1995

By the Commission:

1. The Commission has before it for consideration: (a) the June 16, 1993 action of the Chief, Television Branch, reinstating the construction permit of North Bay Television, Inc. (North Bay) for Station KWOK(TV), Channel 68, Novato, California; (b) the September 3, 1993 action of the Chief, Video Services Division, denying reconsideration of that action; and (c) a September 28, 1993 application for review of those actions, filed by Marin TV Services Partners, Ltd. (Marin TV).

2. We have reviewed the staff actions complained of and we conclude that the matter was fairly considered and properly decided. We do, however, wish to take this opportunity to clarify a portion of the staff's actions, making explicit that which was implied in the staff's actions. First, Section 73.3534(a) of our Rules requires that applications to replace expired construction permits must be filed within 30 days after expiration of a permit. In this case, North Bay allowed its permit to expire, which was then cancelled by the staff several months later. When the staff, for good cause shown, subsequently set aside the cancellation and reinstated the permit, North Bay was left with an expired permit that could not be extended consistent with the requirement that an application for a construction permit to replace an expired permit be filed within 30 days of expiration.

Consequently, to the extent that formal waiver of Section 73.3534(a) of the Commission's Rules was necessary for the consideration of North Bay's replacement application, that rule is hereby waived. Further, although Section 73.3534(e) of our rules provides that a permit under these circumstances can be extended for a maximum of six months, to do so in this case would not afford North Bay the full 24 months for construction normally afforded permittees whose grants were not subjected to judicial review. To ensure that North Bay is allowed an equitable amount of time within which to construct, Section 73.3534(e) of the Commission's Rules is also formally waived. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, Marin TV's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Modification of the Television
Market of Television Station WFSB

Modification of the Television
Market of Television Station WVIT

CSR-3885-A[1]
CSR-3989-A

Attorney General of the State
of Connecticut

State of Connecticut Department
of Public Utility Control

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; Released: May 3, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Pending are two petitions seeking to include certain communities in Fairfield County, Connecticut within the Hartford-New Haven "Area of Dominant Influence" (ADI) for purposes of the cable television mandatory broadcast signal carriage rules. The first (CSR-3885-A) was filed by Richard Blumenthal, the Attorney General of the State of Connecticut (" Attorney General") and seeks to include 16 communities served by Cablevision of Connecticut and Cablevision of Southern Connecticut[2] within the current television market of WFSB and WTIC[3] Hartford; WTNH, New Haven; WTXX, Waterbury; and WVIT, New Britain, Connecticut, all of which are in the Hartford-New Haven ADI. That petition was accompanied by a request for waiver of 47 C.F.R. §76.59 which limits market modification filings to a broadcast station or cable system. WVIT Inc., licensee of station WVIT(TV); Post-Newsweek Stations Connecticut, Inc., licensee of WFSB(TV); and Counterpoint Communications, Inc., licensee of WTXX-TV, filed in support of the Attorney General supplying supporting data. Cablevision of Connecticut and Cablevision Systems of Southern Connecticut (collectively "Cablevision") filed a response to which the Attorney General replied.

2. The second petition (CSR-3989-A) was filed by the State of Connecticut Department of Public Utility Control ("DPUC") and seeks essentially the same relief with respect to "all Connecticut communities located in a broadcast television market outside the State..."[4] This petition was not accompanied by a request seeking a waiver of the standing requirements. WVIT filed in support of the DPUC petition.

BACKGROUND

3. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][5] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[6] a commercial television broadcast station is entitled to assertmandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[7] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[8]

4. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

[1] The Attorney General and the Department of Public Utility Control had also asked to modify the markets of television stations WTIC, WTNH, and WTXX. However, those stations filed separate petitions which have been resolved independently of this matter.

[2] The communities served by Cablevision of Connecticut, include Greenwich, Stamford, New Canaan, Darien, Wilton, Norwalk, Weston, Westport, Redding and Easton. The communities served by Cablevision Systems of Southern Connecticut include Bridgeport, Milford, Fairfield, Stratford, Orange and Woodbridge. The Attorney General requests that these communities be designated as part of both the Hartford-New Haven and New York television markets.

[3] The DPUC included television station WHCT in its original pleading but in an *errata* replaced this station with WTIC.

[4] The PUC lists the same communities in its petition as did the Attorney General with the one exception of the town of Weston. However, the PUC also states that "The Department is not aware of other communities similarly assigned at present but if they are identified as such, this Petition would be applicable to them." Therefore, we shall include the town of Weston, by default, in its petition.

[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] 8 FCC Rcd 2965, 2976-2977 (1993).

[7] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[8] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

5. Section 76.59(a) of the Commission's rules, which establishes the procedural framework request for seeking market changes, provides that:

> The Commission, following a written request *from a broadcast station or a cable system*, may deem that the television market of a particular commercial television broadcast station should include additional communities within its television market or exclude communities from such station's television market. [emphasis added]

6. In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[9]

7. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[10]

8. The Commission provided guidance in *MM Docket 92-259*, supra, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[11]

9. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[12] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[13]

10. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[14] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has

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[9] 47 U.S.C. §534(h)(1)(C)(ii). As Congress recognized, "[t]hese factors are not intended to be exclusive . . . ." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[10] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

[11] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[12] *MM Docket 92-259*, 8 FCC Rcd at 2977 n.139.

[13] 47 C.F.R. §76.59.

[14] 8 FCC Rcd at 2981.

used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

ARGUMENTS OF THE PARTIES

11. As an initial matter, the Attorney General has requested that he be accorded standing to petition for modification of the markets of Hartford-New Haven ADI commercial television stations. The Attorney General cites the Commission's *Report and Order* that allows television broadcasters or cable operators to file for market modification[15] and states that his interests are far broader than the "limited interests" of commercial stations or cable operators in that he is obligated to represent the welfare of 200,000 Fairfield County cable subscribers. The goal of the petition is to prevent these individuals from being "electronically isolated from their home state" by Cablevision, which is not currently obliged to carry television stations outside its New York ADI.[16]

12. Cablevision in opposition argues that the current standing requirement, limiting filings to broadcasters and cable operators, is essential in balancing the goals of public participation and administrative efficiency. Cablevision asserts that without the limitation on standing to file a petition for market modification, the Commission risks numerous repetitive requests for market modification.[17] Cablevision points out that the network affiliates have elected retransmission consent in their home ADI of Hartford-New Haven. Consequently, Cablevision questions their interest in the relief that the Attorney General seeks on their behalf since the stations in any event would be free to request retransmission consent rather than mandatory signal carriage on the Fairfield County cable systems, thus thwarting the Attorney General's request seeking must carry status. Cablevision also notes that the petition raises constitutional concerns because the Attorney General is seeking to dictate its programming line-up indirectly through the market modification process.

13. In reply, the Attorney General argues that he should be granted standing in his capacity as *parens patriae*[18] to protect the interests of his constituents and to ensure that the citizens of Connecticut reap the benefits that Congress intended to bestow upon them in the 1992 Cable Act. The Attorney General comments that granting the waiver request will not increase administrative litigation and will not necessarily trigger other parties to file pleadings. The Attorney General continues by stating that even if the waiver request were granted, the Commission retains the discretion to only grant further waivers to those classes of parties it deems appropriate. The Attorney General also argues that the constitutional concerns raised by Cablevision are without merit citing Congress' finding that Sections 614 and 615 of the Act are valid economic regulations that do not restrictthe editorial discretion of cable operators in the channels at their disposal.[19]

14. With respect to the substance of their requests, the Attorney General and the Connecticut Department of Public Utility Control seek to modify the markets of WFSB, WTNH, WTXX, WVIT, and WTIC, so that certain Fairfield County communities[20] are deemed part of the stations' Hartford-New Haven ADI as well as part of the New York ADI. The Attorney General and DPUC request that the stations' markets be modified so that the 200,000 cable subscribers located in the communities do not face the prospect of losing access to these stations.

15. While the DPUC did not file a waiver seeking relief from our standing requirements, it argues that the stations named in its petition have met the statutory criteria for market modifications. First, each station has been historically carried by cable systems located within Connecticut because the cable operators are serving the communities pursuant to certificates of public convenience and necessity issued by the Department of Public Utility Control and are required to carry Connecticut television stations under state franchise agreements. Second, according to the DPUC, the stations have provided residents in all Connecticut communities with comprehensive news, opinion and analysis of issues in addition to coverage of local, college, and professional sporting events. Third, out-of-state broadcast stations do not routinely cover Connecticut news, government operations, sports or opinion as well as Connecticut stations. Finally, Connecticut broadcast stations are viewed by Connecticut residents; the five stations named in the petition had an overall 21 share of the viewing market in Fairfield County according to 1992 Nielsen figures.

16. In its comments in response to the Attorney General's waiver request, Cablevision argues that the Attorney General fails to make the specific station-by-station showing required to justify the market modifications he seeks. Cablevision comments that it intends to carry the Connecticut network affiliates on its Fairfield County systems if they give consent for the retransmission of their broadcast signals.

17. WFSB states the following facts to have its market modified to include all the Fairfield County communities served by Cablevision of Connecticut and Cablevision of Southern Connecticut. The station is an affiliate of CBS and operates from a transmitter in Avon, Connecticut, which is located 7.3 miles northwest of Hartford, and is part of the Hartford-New Haven ADI. Fairfield County, Connecticut is 37.8 miles southwest of Hartford and is part of the New York ADI, which borders the Hartford-New Haven ADI to the south. WFSB's transmitter is located 32.2 miles northeast of Fairfield County and the station places a Grade B contour over almost all of the county. WFSB has been carried by Cablevision since 1983 and asserts that it has "long provided residents of Fairfield County with coverage of local news, sports, and community affairs." In an attached exhibit, WFSB details that it carried at least forty-six stories originating in Fairfield County communities in the late spring and early summer

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[15] 8 FCC Rcd at 2977.

[16] Attached to the Attorney General's petition is a packet of 65 letters written by consumers concerned that they will be cut off from local Connecticut broadcast service. The Attorney General argues that this is "a compelling demonstration" that consumers, through the Attorney General, have legitimate interests in ensuring carriage of local broadcast stations.

[17] The operator comments that of the five Hartford-New Haven ADI commercial television stations, only two have filed independent petitions although another two have filed supporting comments.

[18] A state has a quasi-sovereign interest and is entitled to be granted *parens patriae* status when: 1) it seeks to protect the well being of its populace, and 2) it seeks to have the benefits of a federal statute accrue to its residents. *See* Snapp & Sons v. Puerto Rico, 458 U.S. 592 (1982).

[19] P *See* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 72 (1992).

[20] *See* footnote 3, above.

of 1993 as well as several editorials of interest to residents in the County. WFSB contends that it earns significant ratings in these communities.[21] WFSB adds that Cablevision has acknowledged that it provides valuable and popular local coverage to its cable subscribers in Fairfield County.[22] Finally, WFSB asserts that New York ADI stations do not provide the level of local news, opinion or analysis specific to Fairfield County that WFSB provides.

18. WVIT asks for the modification of the Hartford-New Haven ADI to include all Fairfield County communities served by Cablevision of Connecticut, Cablevision of Southern Connecticut, Comcast Cablevision of Danbury, Telemedia of Western Connecticut and Crown Houstatonic Cablevision. WVIT then states the following market facts which it argues "militate[s] strongly in favor of awarding WVIT the right to elect must-carry in Fairfield County." Fairfield County is less than 30 miles from New Britain, the station's city of license. WVIT's Grade B contour covers virtually all of that county and its Grade A contour covers nearly half of that county, including Bridgeport, Fairfield's largest city. WVIT states that it has a record of historical carriage on the following cable systems: Cablevision of Connecticut since 1981, Cablevision of Southern Connecticut since 1983, Comcast Cablevision of Danbury since 1967, Telemedia of Western Connecticut since 1972 and Crown Houstatonic Cablevision since 1977. WVIT then explains that it broadcasts pertinent local programming to Fairfield County including three daily half-hour local news broadcasts and has aired at least 575 local news stories since August, 1989. WVIT illustrates that it has broadcast a substantial number of statewide public service campaigns and explains that it is the only Connecticut station which provides viewers with access to the "First Warning System," which through a direct connection to the National Weather Service flashes severe weather advisories on the viewer's screen. Inaddition, WVIT also explains that it provides coverage of New England Patriots football, Boston Celtics Basketball, and exclusive Connecticut broadcasts of Boston Red Sox baseball, to Fairfield County cable subscribers. Finally, WVIT maintains that it covers Connecticut news stories in much more detail than any New York ADI station.

ANALYSIS AND DECISION

19. Three of the stations that are involved in the petitions of the Attorney General and the DPUC have filed independent market modification requests. One of these requests, involving WTNH was previously granted[23] and two additional requests, involving WTIC and WTXX, are being granted simultaneously with this action.[24] Accordingly, we do not further consider modification of the markets of these stations here.

20. With respect to modification of the markets of stations WVIT and WFSB, as requested by the Attorney General and the DPUC, we conclude that consideration of the requests is appropriate but only because the stations have themselves requested the market modifications involved in their supporting comments. The filing of market modification requests by parties other than the parties specifically identified in Section 76.59(a) of the rules as eligible to file such requests -- broadcast stations and cable systems -- creates procedural and substantive difficulties that weigh heavily against expanding filing eligibility. Although governmental entities may generally represent the interests of cable subscribers and television viewers, the 1992 Cable Act and the Commission's rules place many of the decisions concerning broadcast signal carriage directly in the hands of broadcasters and cable operators with the view that service to the public will result from their decisions. For example, as noted above, television broadcast stations have the option of not following the mandatory carriage rules and may opt for negotiating carriage under the Act's retransmission consent provision. Moreover, a station's program purchasing decisions because of contractual exclusivity requirements could be adversely influenced by carriage outside of industry recognized market areas. In addition, whether to opt for carriage may depend on the interest or ability of stations to deliver a good quality signal. For these reasons, the rules restrict the parties eligible to seek market modifications to the involved broadcast stations and cable system operators.[25]

21. We view the instant situation as unique because the stations whose carriage is at issue have participated in the process and thus the joint filings of the stations and the governmental entities provide the Commission with a basis for action. To require the stations involved to refile separately at this point in the process, after the issues have been squarely joined, would be unduly formalistic. We will therefore, relying on the submissions of WFSB and WVIT, consider the requested modifications.

22. WFSB and WVIT have provided sufficient evidence to justify modifying their markets and we grant relief to include those communities specified in each station's individual comments. At the outset, based on the general geography and market structures implicated, it is evident that the requested changes would involve a preferable allocation of the area in question between the markets and would "better effectuate the purposes" of the applicable statutory provisions. For WVIT, Fairfield County is less than 30 miles from New Britain, its city of license. For WFSB, Fairfield County is approximately 40 miles from Hartford, its city of license. Both stations appear closer to Fairfield County than stations licensed in the New York ADI and the Hartford-New Haven ADI abuts the County to the south. Turning to the factors specified in the 1992 Cable Act, we find that WFSB and WVIT have met the statutory requirements, with their history of carriage and local coverage elements being particularly notable.

23. WFSB demonstrates that it has been carried on Cablevision's Fairfield County systems since the early 1980s. The fact that the cable operator has continuously

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[21] FSB incorporates by reference the 1992 Nielsen data submitted by the Attorney General in its petition. The Nielsen County summary for Fairfield County, CT, show that WFSB had a 4 share and a 14 cume. The most recent Arbitron data for 1993 confirms that showing.V

[22] *See In re Cablevision Systems Corporation*, CSR 3873-A (Filed May 3, 1993) at 10-11.

[23] *Cook Inlet Communications, Inc.*, DA 95-541 (released: March 24, 1995).

[24] *Counterpoint Communications, Inc.*, CSR-3839-A (adopted April 20, 1995)(WTXX); *61 Licensee, Inc.*, CSR-4047-A (adopted April 20, 1995)(WTIC).

[25] As Cablevision's filing suggests there may also be First Amendment concerns, apart from the issues in the pending litigation (*Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994)), associated with a state or local government using the must-carry rules process to obtain carriage of particular stations based on the programming content of these stations.

carried WFSB for over 10 years demonstrates WFSB's ties to the communities at issue. With respect to coverage and local service to the cable communities, we believe that WFSB has demonstrated it provides programs of interest to the Fairfield County communities by airing at least forty-six stories originating in Fairfield County communities in May, June and July of 1993 as well as several editorials of interest to the residents in the County. A detailed news log provided by WFSB supports this conclusion. Also important in our decision is Cablevision's acknowledgement that WFSB provides valuable and popular local coverage to its cable subscribers in Fairfield County. As for viewing pattern data in cable and non-cable households, WFSB has a marketplace presence in Fairfield County with a 5 share and 36 net weekly circulation.[26] This is the second highest ranking for a Hartford-New Haven ADI station in Fairfield County and as high as any New York independent commercial television station. Finally, WFSB places a Grade B contour over virtually all of Fairfield County. While we recognize that the station does not cover the southwestern most portion of the county with a predicted Grade B contour, we believe this should not prevent the communities located in this region from being part of the modification since the record demonstrates that WFSB has provided local programming service to those areas. In any event, we believe the historical carriage and programming service elements weigh heavily in favor of granting the petition.

24. WVIT also demonstrates that it meets the historical carriage requirement on several Fairfield County cable systems. The fact that each of the cable operators has carried WVIT for at least 10 years signifies its ties to the Fairfield County communities. With respect to coverage and local service to the cable communities, we believe that WVIT has shown it provides programs of interest to the Fairfield County communities by demonstrating that it airs three daily half-hour local news programs and has broadcast at least 575 local news stories between August, 1989 and the Summer of 1993. Finally, WVIT places a Grade A contour over several of the communities and Grade B contour over virtually all of Fairfield County. Like WFSB, we also recognize that the station does not cover the southwestern most portion of the county with a predicted Grade B contour. Again, we believe this should not prevent the communities located in this region from being part of the modification since the record demonstrates that WVIT has provided local programming service to those areas. As for viewing pattern data in cable and non-cable households, we note that the station has a 3 share and 25 net weekly circulation.[27] We believe that the audience share figure, while not the strongest factor, when taken as a whole with programming coverage and historical carriage warrants a waiver. Finally, WVIT asks that its market be modified to include all Fairfield County Communities served by Cablevision of Connecticut, Cablevision of Southern Connecticut, Comcast Cablevision of Danbury, Telemedia of Western Connecticut and Crown Houstatonic Cablevision. Based on the data before us, WVIT would qualify for such treatment and we therefore modify its market to include all communities served by the above referenced cable operators.

25. With respect to the third statutory factor, we note that WFSB and WVIT indicate that no other television station licensed to communities within the New York ADI provides in-depth coverage of, and programming to, the communities in question. While neither station provides news programming logs of New York ADI stations to which it can make a proper comparison, we do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming stations could deprive cable viewers of any broadcast signals that might provide programming geared to their communities.

ORDER

26. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petitions for special relief filed on April 28, 1993 by the Attorney General for the State of Connecticut (CSR-3885-A) and on July 2, 1993 by the State of Connecticut Department of Public Utility Control (CSR-3989-A) as supported by WVIT Inc. and Post-Newsweek Stations - Connecticut, Inc. ARE GRANTED to the extent indicated herein. WFSB's television market is modified to include the Fairfield County communities served by Cablevision of Connecticut and Cablevision of Southern Connecticut. WVIT's television market is modified to include all Fairfield County communities served by Cablevision of Connecticut, Cablevision of Southern Connecticut, Comcast Cablevision of Danbury, Telemedia of Western Connecticut, and Crown Houstatonic Cablevision. This change shall be effective in accordance with the following schedule: WVIT Inc. and Post-Newsweek Stations - Connecticut, Inc. shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

27. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

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[26] *See* Arbitron's Television County Coverage for 1993.

We recognize that these data are county-based, rather than community-specific. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type.

[27] *See* Arbitron's Television County Coverage for 1993.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-58

In the Matter of

Amendment of Section 73.202(b), RM-8627
Table of Allotments,
FM Broadcast Stations.
(LaMesa and Tahoka, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 26, 1995; Released: May 3, 1995

Comment Date: June 26, 1995
Reply Comment Date: July 11, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by 100.3 Radio, Inc., licensee of Station KIOL(FM), Channel 262C1, LaMesa, Texas, and West Texas Broadcasting Company, Inc., licensee of Station KMMX(FM), Channel 284C1, LaMesa, Texas, ("petitioners"), requesting the reallotment of Channel 262C1 from LaMesa, Texas, to Tahoka, Texas, and the modification of Station KIOL(FM)'s license to specify Tahoka as its community of license.[1]

2. Petitioners seek modification of Station KIOL(FM)'s license pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.[2] Petitioners contend that the reallotment of Channel 262C1 from LaMesa (population 10,809) to Tahoka (population 2,868)[3] will provide the community with its second local FM service, noting that Channel 237A at Tahoka is a vacant channel. Petitioners also state that removal of Channel 262C1 from LaMesa would leave the community with two stations, KMMX(FM), Channel 284C1 and Station KPET(AM). In further support of their proposal, petitioners advise that Takoha is the county seat of Lynn County and neither community is located within an urbanize area. Moreover, petitioners argue that the requested change of city of license for Channel 262C1 would eliminate an existing conflict between Stations KLZK(FM) [formerly KKTC(FM)] at Brownfield and KMMX(FM).[4]

3. We believe petitioners' proposal warrants consideration since it could provide Tahoka with an additional FM service, in this case an operating station, if granted. However, we expect petitioners to submit information describing the loss and gain area, the number of reception services that would serve the gain and loss area, and whether the gain and loss area will include any underserved areas. Petitioners are requested to submit information sufficient to address this issues. *See Change of Community MO&O, supra.* We also propose to modify petitioner's license for Station KIOL(FM) to specify Tahoka as its community of license. In compliance with Section 1.420(i), we will not accept competing expressions of interest in use of Channel 262C1 at Tahoka. Channel 262C1 can be allotted to Tahoka in compliance with the Commission's minimum distance separation requirements with a site restriction of 25.2 kilometers (15.6 miles) north of Tahoka.[5]

4. Accordingly, we seek comments on the proposed amendment of theFM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
LaMesa, Texas	262C1, 284C1	284C1
Tahoka, Texas	237A	237A, 262C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 26, 1995**, and reply comments on or before **July 11, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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[1] Petitioners also submitted an "Agreement", which has subsequently expired, outlining their plan to buy each other's stations at the termination of this proceeding. We believe that the agreement, whether currently enforce, is irrelevant to this proceeding. Moreover, if petitioners believed the agreement constituted the required expression of interest, it did not satisfy that requirement, and before the requested reallotment can be accomplished, petitioners must submit the appropriate expression of interest.

[2] *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7095 (1990).

[3] All population figures are taken from the 1990 U.S. Census.

[4] Petitioners state that they have been operating Stations KIOL(FM) and KMMX(FM) at sites specified in their respective Special Temporary Authorities ("STA") since 1988. Since that time the Commission adopted a proposal to upgrade the facilities of Station KLZK(FM) at Brownfield, Texas, from Channel 280A to Channel 282C2. As a result of that action, KMMX(FM)'s proposal to operate on Channel 284C1 from its current STA site north of LaMesa is short-spaced by 49.4 kilometers to the allotment of Channel 282C2 at Brownfield. Even as a Class A facility, Station KLZK(FM) would still be 45.4 kilometers short-spaced to KMMX(FM)'s proposal. Petitioners submit that adoption of their resolution would clearly serve the public interest since it would permit KLZK(FM) to begin operations on Channel 282C2.

[5] The coordinates for Channel 262C1 at Tahoka are North Latitude 33-23-00 and West Longitude 101-43-00.

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7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATION TELESYSTEMS INTERNATIONAL — File No. I-T-C-95-058

Application for authority to acquire and operate facilities for service to various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 25, 1995; Released: May 3, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File no. I-T-C-95-058 IS GRANTED, and Communication Telesystems International (CTS) is authorized to:

a. acquire on an Indefeasible Right of User (IRU) or ownership basis a one-half interest in and operate the cable facilities set forth in the Appendix hereto:

b. lease and operate any necessary domestic connecting facilities;

c. lease a one-half interest in and operate any necessary overseas connecting facilities; and

d. use said facilities to provide CTS' regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that CTS is authorized to lease the cable facilities specified in the Appendix subject to the following conditions: (1) it is not practicable for CTS to acquire the facilities on an IRU or ownership basis; and (2) the foreign correspondent providing the matching half-circuits owns the facilities and is a duly authorized carrier.

4. IT IS FURTHER ORDERED that neither CTS nor any persons or companies directly or indirectly controlling or controlled by CTS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CTS or any persons or companies controlling or controlled by CTS are parties.

5. IT IS FURTHER ORDERED that our authorization of CTS to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and one of the countries listed in the Appendix hereto -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix hereto or which originate in one of the countries listed in the Appendix hereto and terminate in the United States. In addition, CTS may not -- and CTS' tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the CANUS-1 or NPC-1 cable system issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39.

10. IT IS FURTHER ORDERED that the applicant shall file an application pursuant to Section 214 of the Communications Act of 1934, as amended, before adding any circuits or channels of communication for the provision of service over any private cable system in which circuits are authorized herein.

11. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

COUNTRY	FACILITY	NO. OF CIRCUITS
UNITED KINGDOM	CANUS-1/CANTAT-3	3 E1S
	TAT-11	2 E1S
	TAT-12/13	2 E1S
GERMANY	TAT-10	3 E1S
FRANCE	TAT-11	1 E1
	TAT-12/13	1 E1
NETHERLANDS	TAT-10	1 E1
	TAT-12/13	1 E1
DENMARK	TAT-10	1 E1
	GERMANY-DENMARK-1	1 E1
SPAIN	COLUMBUS 2	1 E1
	TAT-12/13	1 E1
ITALY	COLUMBUS 2	1 E1
	TAT-12/13	1 E1
PORTUGAL	COLUMBUS 2	1 E1
GREECE	COLUMBUS 2	1 E1
	EMOS-1	1 E1
TURKEY	COLUMBUS 2	1 E1
	EMOS-1	1 E1
ISRAEL	COLUMBUS-1	1 E1
	EMOS-1	1 E1
JAPAN	NPC-1	1 E1
	TPC-4	2 E1S
	TPC-5	2 E1S
HONG KONG	NPC-1	1 E1
	MIURA-CHIKURA	1 E1
	HJK	1 E1
PHILIPPINES	NPC-1	1 E1
	MIURA-CHIKURA	1 E1
	TPC-3 (JAPAN-GUAM)	1 E1
	GPT	1 E1
SINGAPORE	NPC-1	1 E1
	KYUSHU-MIURA	1 E1
	APC	1 E1
SOUTH KOREA	NPC-1	1 E1
	MIURA-CHIKURA	1 E1
	HJK	1 E1
AUSTRALIA	HAW-5	1 E1
	PACRIMEAST	1 E1
	TASMAN-2	1 E1
NEW ZEALAND	HAW-5	1 E1
	PACRIMEAST	1 E1
HAWAII	TPC-5	2 E1S
	HAW-4	1 E1
	HAW-5	1 E1
GUAM	TPC-5	2 E1S
AZERBAIJAN	TAT-10	2 DS1S
AUSTRIA	TAT-10	3 DS1S
BELARUS	TAT-10	2 DS1S

BELGIUM	TAT-10	1 E1
	TAT-12/13	1 E1
BULGARIA	TAT-10	3 DS1S
CZECH REPUBLIC	TAT-10	3 DS1S
ESTONIA	TAT-10	2 DS1S
FINLAND	TAT-10	2 E1S
	GERMANY-DENMARK-1	2 E1S
GEORGIA	TAT-10	2 DS1S
HUNGARY	TAT-10	3 DS1S
IRELAND	CANUS-1/CANTAT-3	1 E1
KAZAKHSTAN	TAT-10	2 DS1S
KYRGYZSTAN	TAT-10	2 DS1S
LATVIA	TAT-10	2 DS1S
LIECHTENSTEIN	TAT-12/13	2 DS1S
LITHUANIA	TAT-10	2 DS1S
MONACO	TAT-11	2 DS1S
NORWAY	TAT-10	4 DS1S
POLAND	TAT-10	3 DS1S
ROMANIA	TAT-10	3 DS1S
RUSSIA	TAT-10	1 E1
SAN MARINO	COLUMBUS-2	2 DS1S
SLOVAKIA	TAT-10	2 DS1S
SWEDEN	TAT-10	2 E1S
	GERMANY-DENMARK-1	2 E1S
SWITZERLAND	TAT-10	1 E1
	TAT-12/13	1 E1
TAJIKISTAN	TAT-10	2 DS1S
TURKMENISTAN	TAT-10	2 DS1S
UKRAINE	TAT-10	3 DS1S
UZBEKISTAN	TAT-10	2 DS1S
VATICAN	TAT-12/13	2 DS1S
MEXICO	COLUMBUS-2	1 E1
COSTA RICA	COLUMBUS-2	3 DS1S
EL SALVADOR	COLUMBUS-2	3 DS1S
GUATEMALA	COLUMBUS-2	3 DS1S
HONDURAS	COLUMBUS-2	3 DS1S
NICARAGUA	COLUMBUS-2	3 DS1S
PANAMA	COLUMBUS-2	4 DS1S
TFYR OF MACEDONIA	TAT-12/13	3 DS1S
CROATIA	TAT-12/13	3 DS1S
BOSNIA-HERZEGOVENIA	TAT-12/13	3 DS1S
SLOVENIA	TAT-12/13	3 DS1S
SERBIA & MONTENEGRO	TAT-12/13	3 DS1S

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTEX TELECOMMUNICATIONS, INC. File No. I-T-C-95-189

Application for authority to acquire and operate facilities for service between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 25, 1995; Released: May 3, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-189 IS GRANTED, and INTEX Telecommunications, Inc. (ITI) is authorized to:

a. lease from Comsat and operate the 64-kbps voice-grade satellite circuits listed in the Appendix hereto, between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and earth stations in the countries listed in the Appendix hereto, furnished by its correspondents;

b. lease and operate facilities in the U.S. earth station, to be used in conjunction with the space segment capacity;

c. use the facilities in a and b, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

d. lease from PanAmsat and operate eight 64-kbps satellite circuits between an appropriate licensed U.S. earth station and the PAS-1 satellite, connecting with similar circuits between the satellite and an earth station in Nicaragua, furnished by ITI's correspondent in Nicaragua;

e. lease and operate facilities in the U.S. earth station to be used in conjunction with the space segment capacity;

f. use the facilities in d and e, above, to provide regularly authorized services, including switched voice and data and private line services, between the United States and Nicaragua;

g. lease and operate necessary domestic connecting facilities; and

h. multiplex the circuits authorized herein to derive the maximum number of circuits available.

3. IT IS FURTHER ORDERED that our authorization of ITI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Nicaragua or one of the points listed in the Appendix – that is, private lines which originate in the United States and terminate in Nicaragua or one of the points listed in the Appendix or which originate in Nicaragua or one of the points listed in the Appendix and terminate in the United States. In addition, ITI may not – and ITI's tariff must state that its customers may not – connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither ITI nor any persons or companies directly or indirectly controlling or controlled by ITI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ITI or any persons or companies controlling or controlled by ITI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1 satellite.

11. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the

number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

12. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX

COUNTRY	NO. OF 64-KBPS CIRCUITS
BOLIVIA	8
COSTA RICA	8
EL SALVADOR	12
GUATEMALA	8
MEXICO	12
VENEZUELA	8

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-90

In the Matter of

Amendment of Section 73.202(b),	RM-7128
Table of Allotments,	RM-7332
FM Broadcast Stations.	RM-7410
(Sulphur and South Fort Polk,	RM-7411
Louisiana; Bay City, Edna, Galveston,	RM-7412
Jasper, LaGrange, New Ulm, Palacios,	
Redland, Rosenberg, and	
Winnie, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 27, 1995; Released: May 3, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* (*"Notice"*) in the above-docketed proceeding, 5 FCC Rcd 1274 (1990), which proposed at the request of KSIG Broadcasting Company, Inc. ("KSIG"), licensee of Station KTQQ-FM, Channel 265A (100.9 MHz), Sulphur, Louisiana, substitution of Channel 265C3 for Channel 265A at Sulphur, and modification of the license of Station KTQQ-FM to specify operation on the higher class channel. KSIG is the predecessor in interest to Station KTQQ-FM's present licensee, 21st Century Communications, Inc. ("21st Century"). Roy E. Henderson ("Henderson"), Fort Bend Broadcasting Company, Inc. ("Fort Bend"), and Irvin Davis ("Davis") filed counterproposals. In addition, we treated a petition for rule making filed by Meena Shah Youngblood ("Youngblood") to allot Channel 270A (101.9 MHz) to Sulphur as a counterproposal.[2] Davis, Henderson, Fort Bend, and Radio Lee County ("RLC"), licensee of Station KOKE (formerly KGID), Channel 268C1 (101.5 MHz),[3] Giddings, Texas, filed comments.[4] Sonoma Media Corporation ("Sonoma") filed reply comments and a supplement supporting Davis' counterproposal. Youngblood filed comments supporting her proposal. KSIG and Henderson also filed reply comments.

BACKGROUND

2. This proceeding began when KSIG filed a petition for rule making (RM-7128) requesting that Channel 265A at Sulphur be upgraded to Channel 265C3 and that the license for its Station KTQQ-FM be modified accordingly.[5] Three interrelated counterproposals were filed by Fort Bend, licensee of Station KFRD-FM (now KMPQ-FM), Channel 285A (104.9 MHz), Rosenberg, Texas (RM-7412); by Davis, licensee of Station KRTX(FM), Channel 285A, Galveston, Texas (RM-7410);[6] and by Henderson, d/b/a Timberline Communications, licensee of Station KJAS(FM) (now KMIA-FM), Channel 264C2 (100.7 MHz), Jasper, Texas (RM-7411).[7] [8]

3. Fort Bend requested the co-channel substitution of Channel 285C1 for Channel 285A at Rosenberg and the modification of its authorization for Station KFRD-FM accordingly. It also requested the co-channel substitution of

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[1] South Fort Polk, LA and Bay City, Edna, Galveston, Jasper, LaGrange, New Ulm, Palacios, Redland, Rosenberg, and Winnie, TX, have been added to the caption.

[2] Public Notice of the filing of the respective counterproposals by Henderson, Fort Bend, and Davis was given on July 18, 1990 (Report No. 1823) and by Youngblood on January 14, 1991 (Report No. 1833).

[3] RLC argued that the substitution of Channel 265C3 for Channel 265A at Sulphur could "inhibit" a proposed resolution of MM Docket No. 89-459. That docket was resolved by *Report and Order (Giddings et al., Texas)*, 8 FCC Rcd 1552 (1993), which upgraded RLC Station KGID, Channel 268C2, Giddings, to Channel 268C1 and modified its license accordingly. The effectiveness of the upgrade had been stayed, however, by RLC's filing of a petition for reconsideration and subsequently an application for review in MM Docket No. 89-459. By *Memorandum Opinion and Order*, 9 FCC Rcd 3634 (1994), we lifted the stay and made effective the Giddings upgrade because neither the petition for reconsideration nor the application for review was directed against the upgrade and the reallotment had no impact on it.

[4] KSIG also filed untimely reply comments to the counterproposals and to the comments filed by Davis, Henderson, and Fort Bend, of which we hereby deny acceptance due to the absence of sufficient justification for their tardiness. In addition, late-filed reply comments accompanied by separate motions to accept were also filed by Group W Radio, Inc. ("Group W"), the Rusk Corporation ("Rusk"), and Texas Classical Radio ("Texas Classical"). No good cause was given for acceptance of any of the reply comments, all of which were filed at least four months late. We deny the motions of Group W and Rusk and grant the subsequently filed motion by Texas Classical to withdraw its comments. Therefore, we will not consider these late-filed reply comments. 721st Century, after its assumption of control of KSIG Station KTQQ-FM, filed separate comments expressing its intention to file an application to modify Station KTQQ-FM's facilities should Channel 265C3 be allotted to Sulphur and to construct those facilities expeditiously.

[5] KSIG failed to file timely comments in response to the *Notice* restating its intention to apply for the channel, if allotted. A party's failure to file such continuing expression of interest in its comments can lead to denial of its allotment request. *See* Paragraph 2 of the Appendix to the *Notice*. KSIG instead stated its intention to apply for the channel in reply comments. However, we accept this untimely continuing expression of interest, as acceptance will not cause prejudice to any other timely filed proposal in this docket given its resolution herein.

[6] Davis and Sonoma, proposed assignee of Station KRTX(FM), requested, *inter alia*, the substitution of Channel 263C3 (100.5 MHz) for Channel 285A at Galveston, Texas, the reallotment of the channel to Redland, Texas, and the modification of its authorization for Station KRTX(FM) accordingly. After the close of the comment period, Davis filed comments stating that it was not interested in the change of community (and upgrade) in the event that Sonoma failed to close on the sale of Station KRTX(FM). Several days later, Sonoma filed comments stating that the sale would not close. Accordingly, since the licensee of the station is not interested in pursuing the change in community for Station KRTX(FM), Galveston, we will dismiss this counterproposal without further consideration, and we need not examine any comments addressing it.

[7] Henderson filed a separate rule making petition to allot

Channel 264C for Channel 264C2 at Jasper, the reallotment of the channel to Winnie, Texas, and the modification of Station KJAS(FM)'s authorization accordingly. To accommodate these substitutions, Fort Bend proposed the substitution of Channel 267A (101.3 MHz) for Channel 265A at Sulphur in lieu of KSIG's proposal to substitute Channel 265C3 for Channel 265A at the community; the substitution of Channel 259A (99.7 MHz) for vacant Channel 264A at Palacios, Texas;[9] and the substitution of Channel 239A (95.7 MHz) for vacant Channel 267A at South Fort Polk, Louisiana.[10]

4. Henderson also requested the substitution of Channel 264C for Channel 264C2 at Jasper, Texas, the reallotment of the channel to Winnie, and the modification of its authorization for Station KJAS(FM) accordingly. Henderson specifically referenced and supported the Sulphur, Palacios, and South Fort Polk channel substitutions proposed by Fort Bend.

COMMENTS

5. Henderson and Fort Bend characterize their counterproposals, both of which include the substitution of six kilowatt Channel 267A for three kilowatt Channel 265A at Sulphur, as "slightly less of an upgrade" than the substitution of Channel 265C3 for Channel 265A as proposed by the *Notice*. Henderson contends that his counterproposal would permit expanded service in four communities, including Sulphur. The other portions of Henderson's counterproposal include replacement of three kilowatt with six kilowatt Class A channels at Palacios and at South Fort Polk, and a new first local Class C service at Winnie. In support of the Winnie-to-Jasper reallotment, Henderson argues that Jasper would not be deprived of any existing service, as Station KJAS(FM) has been off the air.[11] Accordingly, he argues, Jasper would not be deprived of any existing reception service, and the community would continue to receive both transmission and reception services.

6. Fort Bend argues that its proposal would serve the public interest by adopting a co-channel upgrade of its Station KFRD(FM) at Rosenberg. It also notes that the proposal would permit first local wide-area services in Redland on Channel 263C3 and in Winnie on Channel 264C, as well as the six kilowatt power increases at Palacios, Sulphur, and South Fort Polk. Fort Bend also supports the reallotment of Channel 264C2 at Jasper as Channel 264C at Winnie.

7. KSIG filed comments generally favoring Henderson's counterproposal. Although KSIG characterizes Henderson's counterproposal to reallot Channel 264C2 and move Station KJAS-FM from Jasper to Winnie as an attempt to deprive Jasper of its local station in order to add another station to Houston, Texas, it concedes that grant of Henderson's proposal would serve more persons than would the allotment of Channel 270A to Sulphur. KSIG argues that, in terms of maximizing the number of services, an upgrade of Station KTQQ-FM from Channel 265A to Channel 267C3 and adoption of Henderson's counterproposal represent the optimum solution.

8. Most recently, a series of pleadings were filed by three of the parties -- Youngblood, Henderson, and 21st Century (successor to KSIG) -- proposing actions that, it is asserted, would result in a "global resolution" of the contested issues in this proceeding. First, Youngblood requests that her petition to allot Channel 270A to Sulphur be withdrawn, for which she received compensation for her legitimate and prudent expenses in preparing and filing of her petition. Second, Henderson moves to withdraw his rule making petition RM-7412, which had proposed the upgrade of Channel 285A at Rosenberg to Channel 285C1. In addition, Henderson anticipates our dismissal of petition RM-7410, which proposed the reallotment of Channel 263A at Galveston to Redland, related in note 6, *supra*, and recommends that we so dismiss. Henderson contends that such dismissal eliminates the remaining conflict with his petition to move Channel 264C2 from his licensed Station KMIA-FM (formerly KJAS(FM)) at Jasper to the new com-

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Channel 269A to Iowa, LA. This proposal was short-spaced to Youngblood's counterproposal to allot Channel 270A to Sulphur (RM-7332). To accommodate his request, Henderson proposed the substitution of Channel 250A for Channel 269A at De Ridder, LA, and modification of the license for Station KEAZ-FM, De Ridder, accordingly. We returned Henderson's petition by letter as he failed to serve the licensee of Station KEAZ-FM with a copy of the petition, as required by §1.401(d), and failed to state his commitment to reimburse the station for expenses associated with the change in channel. *See* Letter from Acting Chief, Allocations Branch, to Counsel to Roy E. Henderson (December 31, 1990). Henderson resubmitted his petition with the infirmities cured. He also filed a petition for reconsideration of the return of his original rule making petition. As Youngblood's petition will be dismissed pursuant to her request (*see* para. 8, *infra.*), Henderson's resubmitted rule making request to allot Channel 269A to Iowa is being considered separately from this proceeding. Therefore, we will dismiss Henderson's petition for reconsideration as moot, and will not further consider that reconsideration request in this proceeding.

[8] Henderson also was the assignee of Station KRTX(FM), Galveston.

[9] When the Fort Bend counterproposal was filed, Joseph L. Sandlin was an applicant for the Palacios channel (File No. BPH-860313MP). Sandlin stated in a letter appended to Henderson's reply comments that he supported the change in frequency. Sandlin's application was returned on March 1, 1991, and the Palacios channel is currently vacant and unapplied for.

[10] Fort Bend originally requested four additional substitutions, two of which constituted proposals to substitute Channel 269C2 (101.7 MHz) for Channel 241C2 (96.1 MHz) at Bay City, TX, and to modify the authorization for Station KXGJ, Bay City, accordingly, and to substitute Channel 241A for Channel 269A at Edna, TX. We need not consider these proposals in this proceeding, as these substitutions were subsequently adopted in a separate proceeding. *See Report and Order (Bay City and Edna, Texas)* (MM Docket No. 92-56), 7 FCC Rcd 4132 (1992), *recon. denied*, 7 FCC Rcd 6266 (1992). Fort Bend also requested the substitution of Channel 222A for Channel 285A at LaGrange, TX, and Channel 247A for Channel 222A at New Ulm, TX. This aspect of Fort Bend's counterproposal was unacceptable for consideration, and should not have been placed on public notice, as these substitutions were dependent upon a final resolution of MM Docket No. 89-459. In any event, after the close of the comment period, Fort Bend withdrew its request for these latter two substitutions. Therefore, we need not consider the Bay City, Edna, LaGrange, and New Ulm channel substitution proposals.

[11] Station KJAS(FM), now KMIA-FM, remains off the air pursuant to special temporary authorization, pending implementation of a minor change application (File No. BPH-910306IA).

munity of license, Winnie, and to upgrade it to a Class C channel. Henderson also notes that dismissal of Youngblood's petition would permit an increase in the maximum ERP to six kilowatts at Sulphur Class A Station KTQQ-FM at its existing site.

9. Henderson reports in a subsequently filed addendum that further engineering analysis has revealed that the original rule making proposal by 21st Century's predecessor in interest, KSIG, can be accommodated -- the C3 upgrade of the Class A channel at Sulphur.[12] Henderson also notes that subsequent to its proposal to reallot and upgrade Jasper Channel 264C2 to Winnie on Channel 264C, Channel 297A has been allotted to Jasper (to join already allotted Channel 272C2) but no station using that channel is licensed and operating. Henderson asserts that "all conflicts between petitioners in this Docket have now been resolved," and that the remaining proposals would result in increased service and would result in increased efficiency in the use of the spectrum.

DISCUSSION

10. We have carefully examined the proposals in this proceeding, including the those most recently filed, which, it is claimed, would result in a global resolution of this proceeding. We find that the proposed change of community of license from Jasper to Winnie can now be evaluated without consideration of any conflicts, and that the initial rule making request, proposing a C3 upgrade at Sulphur, can be granted. Each of these proposals will be discussed in turn.

11. In considering the most recently filed proposals to resolve the outstanding conflicts, we will grant Youngblood's request to withdraw her petition to allot Channel 270A to Sulphur, for which she received compensation for her legitimate and prudent expenses in the preparation, filing, and prosecution of the petition.[13] [14] We will also dismiss RM-7412, proposing to upgrade Channel 285A to Channel 285C1 at Rosenberg, pursuant to Henderson's request, and will dismiss the proposed reallotment of Channel 263A at Galveston to Redland, as recommended by Henderson. We will now consider the proposals of the remaining two parties to the proceeding, Henderson and 21st Century.

12. *Jasper and Winnie, Texas.* We will grant Henderson's proposal to substitute Channel 264C for Channel 264C2 at Jasper and reallot the channel to Winnie as its first local service. As an initial matter, we note that Winnie, a Census Designated Place according to the 1990 U.S. Census with a population of 2238, is not within any urbanized area as defined by the U.S. Census. We have stated that we will not presume that a community outside of but near an Urbanized Area is not entitled to a first local service preference. *See Van Wert, Ohio and Monroeville, Indiana*, 7 FCC Rcd 6519, 6520 (1992).[15] [16]

13. In examining the merits of a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*) In determining whether a proposed reallotment represents a preferential arrangement of channels, we apply the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d88, 92 (1982).[17] Under priority 3), Winnie is favored as a first local service over Jasper, a community of 6,959 persons, which will retain three local aural transmission services.[18]

14. Furthermore, this proposal should result in additional reception service to a net population of greater than 1.9 million.[19] We will, therefore, grant Henderson's counterproposal, and believe that the public interest would be best served by its proposal to reallot Channel 264C at Jasper so as to provide a first local transmission service to

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[12] 21st Century, requesting the incorporation by reference of Henderson's engineering statement, shortly thereafter filed an amendment proposing the substitution of Channel 267C3 rather than Channel 265C3 for Channel 265A at Sulphur, Station KTQQ-FM, at its existing transmitter site.

[13] Youngblood filed an affidavit setting forth the requisite certification that she will receive, as consideration for her withdrawal of the petition, reimbursement of only the reasonable and prudent expenses incurred in prosecuting the petition. She also submits an itemized bill for her engineering expenses totaling $8830.00, and the agreement between herself and Third Partner Broadcasting, Inc. ("Third Partner"), licensee of KSIG-FM, Basile, LA, setting forth the terms of the reimbursement. The agreement limits the reimbursement amount to $5000.00 and contemplates Commission "advance approval" of the specified payments set forth in the bill. We do not however, believe that any advance approval is necessary. Even though as certified by Youngblood, the $8830.00 bill constitutes her legitimate and prudent expenses, she and Third Partner have agreed that reimbursement of those expenses will be limited to $5000.00 as consideration for Youngblood's withdrawal of her petition. The agreement therefore complies with the requirements of Section 1.420(j).

[14] Youngblood's request for approval of its withdrawal was preceded by her filing of supplemental comments, by Henderson's motion for extension of time to respond to these comments, and by his opposition to their acceptance. In view of the dismissal herein of Youngblood's petition, we consider these pleadings moot.

[15] Winnie is approximately 95 km (59 mi) east of Houston and Jasper is approximately 184 km (114 mi) northeast of Houston.

[16] As discussed in para. 8, *supra*, Henderson as successor in interest to Fort Bend, moved to dismiss the Rosenberg proposal to upgrade Channel 285A to Channel 285C1. We note that the dismissal of the Galveston to Redland change of community proposal and the withdrawal of the LaGrange substitution proposal advanced by Henderson's predecessor, Fort Bend, would preclude the Rosenberg proposal. These two proposals would have eliminated the short spacings of Station KMPQ-FM (formerly KFRD-FM) to Station KRTX-FM at Galveston and to Channel 285A at LaGrange. Therefore, the Rosenberg proposal would be denied in any event. Nevertheless, we will grant this dismissal.

[17] The FM allotment priorities are: 1) first aural service, 2) second aural service, 3) first local service, and 4) other public interest matters.

[18] Jasper has the following broadcast radio stations assigned to it: Stations KWYX-FM, KTXJ-AM, and KNKE(FM). The latter station, to operate on Channel 279A, was granted a construction permit (File No. BPH-911226MF), pursuant to which a pending further extension of time to construct has been granted.

[19] Our engineering analysis indicates that the operation of Channel 264C at Winnie would provide additional reception service to an estimated 2,071,272 persons in an area of 14,978 square kilometers. We also found that removal of Channel 264C2 from Jasper would result in a loss of reception service to some 146,502 persons in an area of 12,195 square kilometers. However, we have determined that the entire reception loss area would continue to receive service from at least five stations. Moreover, loss of the reception service provided by Station

the community of Winnie. To accommodate the reallotment to Winnie, we will substitute Channel 259A for vacant Channel 264A at Palacios.

15. *Sulphur, Louisiana.* The reallotment of Channel 264C to Winnie conflicts with the proposal in the *Notice* to upgrade Station KTQQ-FM at Sulphur on Channel 265C3. However, since we have dismissed Youngblood's proposal to allot Channel 270A to Sulphur, Channel 267C3 is available for substitution at Sulphur. Therefore, we will substitute Channel 267C3 for Channel 265A at Sulphur and amend the authorization for Station KTQQ-FM accordingly. In order to accommodate this channel upgrade, we will substitute Channel 239A for vacant Channel 267A at South Fort Polk, Louisiana.[20]

TECHNICAL SUMMARY

16. Channel 264C can be allotted to Winnie at 29-49-12 and 94-23-00, and, to accommodate that allotment, Channel 259A can be allotted to Palacios at coordinates 28-42-00 and 96-12-48, with both allotments in compliance with the minimum distance separation requirements of the Rules. Since this reference site for Palacios is located within 320 kilometers (199 miles) of the U.S.- Mexican border, concurrence by the Mexican government has been obtained. Channel 267C3 can be allotted to Sulphur at Station KTQQ-FM's current site, 30-14-55 and 93-17-56, and Channel 239A can be allotted to South Fort Polk at coordinates 31-08-33 and 93-15-15 to accommodate the Sulphur allotment, both in compliance with the minimum distance separation requirements of the Rules.

ORDERING CLAUSES

17. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 19, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Sulphur, Louisiana	267C3
South Fort Polk, Louisiana	239A
Winnie, Texas	264C
Palacios, Texas	259A

18. The window period for filing applications for Channel 239A at South Fort Polk, Louisiana will open on **June 19, 1995**, and close on **July 20, 1995**.

19. The window period for filing applications for Channel 259A at Palacios, Texas will open on **June 19, 1995**, and close on **July 20, 1995**.

20. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Roy E. Henderson for Station KMIA-FM, Channel 264C2, Jasper, Texas, IS MODIFIED to specify operation on Channel 264C at Winnie, Texas as its new community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1260 of the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

21. IT IS FURTHER ORDERED That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KTQQ-FM, Sulphur, Louisiana, IS MODIFIED to specify operation on Channel 267C3, in lieu of Channel 265A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license for Station KTQQ-FM, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for modification of construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-890131XY, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

22. IT IS FURTHER ORDERED, That the counterproposal (RM-7412) filed by Fort Bend Broadcasting Company, Inc., proposing that Channel 285A be substituted for Channel 285C1 at Rosenberg, Texas; that Channel 264C be substituted for Channel 264C2 at Jasper, Texas and reallotment of Channel 264C to Winnie, Texas; that Channel 269C2 be substituted for Channel 241C2 at Bay City, Texas; that Channel 241A be substituted for Channel 269A at Edna, Texas; that Channel 222A H&be substituted for Channel 285A at LaGrange, Texas; that Channel 247A be substituted for Channel 222A at New Ulm, Texas; and proposing that the respective station licenses, where relevant, be modified; IS DISMISSED.

23. IT IS FURTHER ORDERED, That the counterproposal (RM-7411) filed by Roy E. Henderson proposing that Channel 267A be allotted to Sulphur, Louisiana; that Channel 264C be substituted for Channel 264C2 at Jasper, Texas and reallotment of Channel 264C to Winnie, Texas; that Channel 259A be substituted for Channel 264A at

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KMIA-FM (formerly KJAS(FM)), Channel 264C2, Jasper, is somewhat hypothetical in that the station has been off the air for over three years and has not been providing any service to Jasper whatsoever. *See* note 11, *supra*. All population estimates are based on the 1990 U.S. Census.

[20] On June 24, 1991, the construction permit for Station KZRO, Channel 267A, South Fort Polk, was cancelled. We will therefore open a new window for Channel 239A at South Fort Polk.

Palacios, Texas; that Channel 239A be substituted for Channel 267A at South Fort Polk, Louisiana; and proposing that the respective station licenses, where relevant, be modified; IS GRANTED IN PART.

24. IT IS FURTHER ORDERED, That the counterproposal (RM-7410) filed by Irvin Davis proposing that Channel 267A be allotted to Sulphur, Louisiana; that Channel 264C be substituted for Channel 264C2 at Jasper, Texas and reallotment of Channel 264C to Winnie, Texas; that Channel 259A be substituted for Channel 264A at Palacios, Texas; that Channel 239A be substituted for Channel 267A at South Fort Polk, Louisiana; and that Channel 263C3 be substituted for Channel 285A at Galveston, Texas and the channel be reallotted to Redland, Texas; and proposing that the respective station licenses, where relevant, be modified; IS DISMISSED.

25. IT IS FURTHER ORDERED, That the counterproposal (RM-7332) filed by Meena Shah Youngblood proposing that Channel 270A be allotted to Sulphur, Louisiana IS DISMISSED.

26. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

27. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Released: May 4, 1995

Act III Broadcasting License Corporation 1800E
951 Whitehaven Road
Grand Island, NY 14072

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098h)(1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WUTV(TV), Buffalo, NY (File No. BRCT-940201LI). In a supplement to that renewal application you state that during the previous license term WUTV(TV) did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you reveal that between January 22, 1993, and December 9, 1993, WUTV(TV) exceeded the commercial limits on children's programming on 8 occasions. Of these 8 commercial overages, 3 were fifteen seconds in length; one was thirty seconds in length; and four were program-length commercials. You state that all of the commercial overages were inadvertent, and/or were "isolated instances of human error"; and that WUTV(TV) "has in place policies designed to assure future compliance."

WUTV(TV)'s record during the last license term of exceeding the Commission's commercial limits on children's television programming on 8 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Act III Broadcasting License Corporation is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compli-

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)("*Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

ance...." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. The commercial overages and program-length commercials described in WUTV(TV)'s renewal application clearly indicate that WUTV(TV) did not initially establish an effective program to monitor compliance with the Commission's limits on commercial matter in children's programming. Further, four of WUTV(TV)'s violations were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this nature and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. The only reasons for the cited violations proffered by WUTV(TV), inadvertence and/or human error, do not justify or excuse such violations. Finally, the fact that now WUTV(TV) may have implemented a plan to prevent future violations of the Commission's children's television commercial limitations does not relieve the licensee of liability for violations which have occurred. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe thatthese violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WUTV(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Act III Broadcasting License Corporation, File No. BRCT-940201LI, for Station WUTV(TV), Buffalo, NY, IS HEREBY GRANTED for a term to end on June 1, 1999.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: Grover C. Cooper, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Released: May 4, 1995

Buffalo Management Enterprises Co., Inc. 1800E
2077 Elmwood Drive
Buffalo, NY 14207

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WIVB-TV, Buffalo, NY (File No. BRCT-940201KV). In a supplement to that renewal application you state that during the previous license term WIVB-TV did not comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 3 to your application you reveal that between March 12, 1992, and May 22, 1993, WIVB-TV exceeded the commercial limits on children's programming on 11 occasions. Of these 11 commercial overages, 5 were thirty seconds in length; two were one minute in length; one was one minute and thirty seconds in length; and three were program-length commercials. You state that all of the commercial overages were inadvertent, and/or resulted from human error on the part of various members of the station's staff; and that after each violation WIVB-TV "reinforced internal procedures... to ensure compliance."

WIVB-TV's record during the last license term of exceeding the Commission's commercial limits on children's television programming on 11 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Buffalo Management Enterprises Co., Inc. is hereby advised of its apparent liability for forfeiture in the amount of ten thousand dollars ($10,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)("*Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

cable operators to hone their plans to ensure compliance...." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. The commercial overages and program-length commercials described in WIVB-TV's renewal application clearly indicate that WIVB-TV did not initially establish an effective program to monitor compliance with the Commission's limits on commercial matter in children's programming. Further, although you assert that after each violation WIVB-TV "reinforced internal procedures... to ensure compliance", violations continued to occur. In addition, three of WIVB-TV's violations were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this nature and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. The only reasons for the cited violations proffered by WIVB-TV, inadvertence and/or human error, do not justify or excuse such violations. Finally, the fact that now WIVB-TV may have implemented a plan to prevent future violations of the Commission's children's television commercial limitations does not relieve the licensee of liability for violations which have occurred. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $10,000.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question offact as to whether grant of the license renewal application for Station WIVB-TV would serve the public interest, convenience and necessity. Therefore, the license renewal application of Buffalo Management Enterprises Co., Inc., File No. BRCT-940201KV, for Station WIVB-TV, Buffalo, NY, IS HEREBY GRANTED for a term to end on June 1, 1999.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: William R. Richardson, Jr., Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Released: May 4, 1995

Fox Television Stations, Inc. 1800E
Licensee, WNYW(TV)
c/o Molly Pauker, Esq.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On February 1, 1994, you filed an application for renewal of license (FCC Form 303-S) for Station WNYW(TV), New York, NY (File No. BRCT-940201KZ). In a supplement to FCC Form 303-S you indicate that during the previous license term WNYW(TV) had not complied with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commissions Rules. In Exhibit 4(b) to your application you state that from February 4, 1992, to September 29, 1993, WNYW(TV) "possibl[y]" exceeded the commercial limits on children's programming on 14 occasions, in that, on the specified dates, "a commercial containing a character that also appeared in the program may have been inadvertently broadcast during or at either end of the program." You further state that the station could not verify the exact number of violations because you could not "confirm or refute what the station log audit suggests". Finally, you state that when the violations were discovered the station instituted procedures to prevent their recurrence, and that, since the institution of such procedures, there have been no additional violations.

In *Children's Television Programming, supra* 6 FCC Rcd at 2117-18, the Commission specifically and unequivocally defined a program-length commercial as "a program associated with a product in which commercials for that product are aired". Further, in *Children's Television Programming/recon., supra*, the Commission provided additional guidance regarding program-length commercials, *i.e.*, that a commercial for a program-related product must "be separated from a children's program to which it is related by intervening and unrelated program material", *id.* 6 FCC Rcd at 5099; and that "intervening commercial matter will not suffice as a separation device." *Id.* at 5099 n.89.[1] Thus, as stated in *Children's Television Programming, supra* 6 FCC Rcd at 2118, the Commission's definition of and policy on children's program-length commercials "is clear, easy to understand and apply, and narrowly tailored." *Id.* at 2118.

During the license term in question, after the children's programming commercial limitations became effective, you exceeded those limitations on 14 occasions, all program-length commercials. This record constitutes a repeated violation of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Fox Television Stations, Inc., is hereby advised of its apparent liability for forfeiture in the amount of fifteen thousand dollars ($15,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules.[2] The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the spe-

[1] *See also, Children's Television Programming, supra* 6 FCC Rcd at 2112, for the definition of "program", *i.e.*, "an identifiable unit of program material that is not a commercial or promotional announcement."

[2] In *Children's Television Programming, supra* 6 FCC Rcd at 2113, the Commission stated that television licensees must "maintain records sufficient to verify compliance with the Act's commercial limits." In this regard, the Commission delayed the effective date of the children's television commercial limitations for three months (until January 1, 1992) in part in order to enable broadcasters to familiarize themselves with the requirements and to design station procedures and policies to ensure their compliance. *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. Television licensees may not avoid compliance with the children's television commercial limitations rules and policies, or the imposition of appropriate sanctions for violations of those rules and policies, by maintaining records which are insufficient "to confirm or refute" what the station's log "suggests".

cific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[3]

The 14 occasions on which WNYW(TV) exceeded the hourly limits on commercial matter during children's programming is a significant number of violations. Moreover, all 14 occurrences were program-length commercials. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. In addition, the violations occurred over a period of 19 months, from February, 1992, until September, 1993. Thus it is clear that, during this 19-month period WNYW(TV) did not have an effective program to ensure compliance with the Commission's rules and policies concerning commercial matter in children's television programs. Finally, the fact that WNYW(TV) now may have implemented a plan to prevent future violations of the Commission's children's television rules and policies does not relieve the station of liability for prior violations. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $15,000.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau
Enclosure

[3] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)(" *Policy Statement/Assessing Forfeitures")*, which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, __ FCC Rcd _____ (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alascom, Inc., Cost Allocation Plan for the Separation of Bush and Non-Bush Costs — AAD 94-119

ORDER

Adopted: April 9, 1995 **Released: May 4, 1995**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In a Memorandum Opinion and Order (*"MO&O"*) released on May 24, 1994,[1] the Commission adopted a plan to govern interstate telecommunications services between Alaska and the other states. The Commission adopted this plan in order to, among other things, implement a new market structure that will increase competition in telecommunications services to and from Alaska. Under the plan, Alascom, Inc. ("Alascom") will provide interexchange carriers ("IXCs") common carrier services under tariff offered on a non-discriminatory basis at rates that reflect Alascom's costs of service. The plan also provides that Alascom shall have separate tariff schedules for locations where Alascom faces facilities competition and for locations where Alascom has a facilities monopoly, and requires that costs of service in each of these categories be defined pursuant to a cost allocation plan ("CAP") developed by Alascom, subject to Commission approval.[2] The Commission also delegated to the Chief, Common Carrier Bureau ("Bureau"), authority to review Alascom's CAP and to require any subsequent revisions based on the Bureau's analysis and consideration of public comment.[3]

2. On August 29, 1994, Alascom filed its CAP as required by the *MO&O*. We solicited public comment on the CAP in a public notice released September 12, 1994.[4] American Telephone and Telegraph Company ("AT&T"), MCI Communications Corporation ("MCI"), and General Communications, Inc. ("GCI") filed comments, and Alascom filed a reply. In this Order, we find Alascom's CAP deficient in two respects: (1) certain portions of the CAP do not provide enough information to determine how Alascom intends to allocate its costs between bush and non-bush activities; and (2) other portions of the plan do not comply with the Commission's cost allocation rules. We therefore reject the proposed CAP and require Alascom to submit a revised plan within sixty days of the release date of this Order.

II. BACKGROUND

3. Currently Alascom and AT&T provide telephone service between Alaska and the other states pursuant to a Joint Services Agreement ("JSA"). The JSA is a contract, between Alascom and AT&T, that was approved by the Commission in 1981 as one of several steps necessary to accomplish interstate rate integration in Alaska.[5] Rate integration is the Commission policy that was adopted to describe service between the lower 48 states and Alaska, Hawaii, Puerto Rico, and the Virgin Islands at rates that are equivalent to those prevailing for comparable distances in the lower 48 states.[6] Therefore, the rate tables governing interstate calls to and from Alaska are equivalent to the rate tables governing interstate calls beginning and ending in the lower 48 states. In the JSA Alascom and AT&T agreed to jointly provide interstate message telephone service, with Alascom responsible for carriage to, from, and within Alaska, and AT&T responsible for carriage in the lower 48 states. Under the terms of the JSA, AT&T is obligated to pay all of Alascom's costs related to interstate message telephone service, including an earned rate of return on interstate investment equal to that of AT&T's nationwide return. For many years, including the current year, this has resulted in a subsidy paid by AT&T because Alascom's costs have exceeded the interstate message telephone service revenues that AT&T receives from serving the Alaska market. The *MO&O* requires the termination of the JSA on January 1, 1996, if certain conditions are met. On that date Alascom must offer its tariffed common carrier services to other interexchange carriers on a non-discriminatory basis at rates that reflect its costs of service. It must offer these services under separate rate schedules for its bush and non-bush operations. These rate schedules must be supported by cost allocation studies that are consistent with the Commission's joint cost rules[7] and with a Commission-approved CAP.[8]

4. The Commission's joint cost rules set forth principles defining how a carrier must allocate its common costs between its regulated and nonregulated operations. In the *MO&O*, the Commission adopted the Joint Board recommendation that these same principles be applied to allocate Alascom's costs between its bush and non-bush operations.[9] Two of the joint cost rules are relevant here. The first, Section 64.901, contains a hierarchy of cost ap-

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[1] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, 9 FCC Rcd 3023 (1994)(*"MO&O"*). *See also* Alaska Joint Board Final Recommended Decision, 9 FCC Rcd 2197 (Joint Board 1993) (*"Final Recommended Decision"*).

[2] Alascom has a facilities monopoly to provide interexchange services to certain small, remote villages in Alaska known as "bush" communities. In this Order, we refer to the other locations in Alaska to which Alascom provides interexchange services as "non-bush".

[3] *MO&O* 9 FCC Rcd at 3033, para. 58, n.78.

[4] Comments Sought on Alascom, Inc. Cost Allocation Plan, 9 FCC Rcd 3598 (1994).

[5] *See Memorandum Opinion and Order* in W-P-C 649 *et al.*, 87 FCC 2d 25 (1981).

[6] *See Final Recommended Decision*, 9 FCC Rcd at 2198, n.2.

[7] *See* 47 C.F.R. §§32.27 and 64.901-64.904.

[8] *See MO&O*, 9 FCC Rcd at 3023-3024.

[9] The costs under consideration herein are Alascom's regulated costs. Alascom's nonregulated costs are outside the scope of this proceeding. Alascom, however, must also comply with the joint cost rules to ensure that its regulated activities do not subsidize its nonregulated activities. *See supra*. n. 5.

portionment methods that emphasize the direct assignment of costs and the use of cost-causative allocation methods. As applied to Alascom, this rule provides that, whenever possible, costs must be directly assigned to bush or non-bush activities. If costs cannot be directly assigned, they are considered common costs, and they must be placed in common cost pools, which are homogeneous categories designed to facilitate the allocation of costs. The costs in these pools must then be allocated between bush and non-bush activities using a factor that reflects cost causality.

5. Although the *Joint Cost Order* did not prescribe specific allocators for each cost pool, it established guidelines for the use of cost-causative allocation methods. Whenever possible, common costs must be attributed based upon direct analysis of the origin of the costs themselves. Common costs that cannot be directly attributed must be indirectly attributed based on an indirect, cost-causative linkage to another cost pool or group of cost pools for which a direct assignment or attribution is available. If direct or indirect measures of cost-causation are not available, the cost pool must be allocated using a prescribed general allocator.[10]

6. The second Commission rule relevant here is Section 64.903. That rule, as adapted to Alascom, requires that the CAP contain the following information: (a) a list of bush locations; (b) a chart showing all of Alascom's corporate affiliates; (c) a statement that describes affiliates that engage, or will engage, in transactions with Alascom and that describes the nature, terms, and frequency of such transactions;[11] (d) for each regulated account, a detailed description of the cost pools to which portions of the account will be assigned and the basis on which each cost pool will be allocated between bush and non-bush operations; and (e) a description of each time reporting method that Alascom uses and of the employee groups that use each reporting method.[12]

III. DISCUSSION

A. Alascom's CAP Filing

1. The Alascom CAP has five sections. Section I provides a brief overview of the purposes of the CAP and provides a flow chart showing Alascom's proposed cost apportionment process. Section II explains how Alascom distinguishes between bush and non-bush service areas. Section III describes how Alascom tracks network investment and expenses in its Part 32 Uniform System of Accounts ("USOA") accounts[13] and how it apportions these costs between bush and non-bush activities. Section IV contains two cost allocation tables, the master apportionment table and the operations apportionment table. The master apportionment table lists the Part 32 accounts and the categories within each account that Alascom uses to group its costs prior to its applying the cost pool apportionment process. For those plant and plant related expense accounts that include an operations category, the master apportionment table refers the reader to the operations apportionment table. This table contains fourteen cost pools that Alascom uses to allocate the investment and expenses associated with its network. Section V lists Alascom's bush and non-bush geographic locations.

B. Comments & Replies

8. AT&T, MCI and GCI each object to Alascom's CAP. AT&T argues that the CAP does not divide costs into bush, non-bush and common as the principles established in the *Joint Cost Order* and the recommendations of the Joint Board require.[14] AT&T states that the CAP does not explain how Alascom intends to apportion costs in accounts that contain more than one cost pool.[15] AT&T contends that we should require Alascom to refile its CAP and permit interested parties to comment on the revised submission.[16] GCI states that, because Alascom groups costs based upon the functions of certain equipment within its network, it will be impossible to verify its bush and non-bush allocation process.[17] GCI and MCI state that Alascom has incorrectly categorized certain earth station sites as bush.[18] GCI provides a list of several locations that it believes must be excluded from Alascom's list of bush locations.[19] MCI urges the Commission to audit Alascom in order to obtain an accurate understanding of Alascom's bush and non-bush investment.[20]

9. In its Reply, Alascom states that its CAP properly applies the joint cost rules to the bush and non-bush cost allocation process. Alascom states that application of this methodology results in direct assignment of 20 percent of its network investment to either its bush or non-bush operations and that it directly assigns the investment, revenues, and expenses associated with every terminal end point to either the bush or non-bush categories.[21] Alascom claims that the CAP proposed by GCI would not allocate

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[10] *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*) *recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990). *See also* 47 C.F.R. §64.901. Under the Joint Cost rules, the general allocator for regulated and nonregulated residual costs would be computed as follows: (*See* 47 C.F.R. §64.901(b)(3)(iii).)

A. The percent of residual costs allocated to regulated (R%) is computed as follows:

$$\frac{\text{Expenses Directly assigned \& Directly attributed to regulated}}{\text{Total expenses directly assigned \& directly attributable to regulated and nonregulated d}} \times 100 = R\%$$

B. The percent of residual costs allocated to nonregulated (N%) is computed as follows: 100% - R% = N%

[11] The Joint Board recommended that the Commission closely examine Alascom's affiliate transactions costs. *See Final Recommended Decision*, 9 FCC Rcd at 2206.

[12] *See* 47 C.F.R. §64.903.

[13] The Part 32 USOA contains the balance sheet and income statement accounts and accounting procedures that all fully subject telecommunications carriers must follow. *See* 47 C.F.R. Part 32.

[14] AT&T Comments at 3-4.

[15] *Id.* at 4-5.

[16] *Id.* at 5.

[17] GCI Comments at 2-3.

[18] *Id.* at 1& 5-6; MCI Comments at 1.

[19] GCI Comments at 5-6.

[20] MCI Comments at 1-2.

[21] Alascom defines terminal end point as follows: "Network

costs on a fully distributed basis as required by the joint cost rules.[22] In response to claims that it incorrectly categorized sites as bush, Alascom states that it will revise its CAP to delete three sites from its list of bush locations. Alascom claims that all other categorizations of bush and non-bush locations comply with the Commission's definition of these sites.[23]

C. Discussion

10. Under the cost allocation principles adopted in the *MO&O* rules, Alascom's CAP must explain how costs are grouped into cost pools and how the cost pools are allocated between bush and non-bush activities. Those principles also require Alascom to directly assign costs to the maximum extent possible. As discussed below, Alascom's CAP fails to describe in detail its proposed allocation process. This lack of information makes it impossible for the Commission to evaluate that process.

1) Explanations of Apportionment Methods

11. Alascom states that its Part 32 accounting system contains numerous subaccounts. These subaccounts are based upon cost location codes that track network investment and expenses by geographic location or function. Alascom apportions the costs in these accounts in several steps. First, Alascom analyzes the cost location codes for each subaccount within an account. Then, it disaggregates the subaccounts within each account and, using the cost location codes, it sorts the costs into one or more of the following categories based on the business function: operations, customer service, administration and executive. Next, Alascom apportions costs in the operations and customer service categories into cost pools. Finally, Alascom allocates these cost pools between bush and non-bush locations using various allocators. Alascom uses "general allocators" to allocate costs in the administration and executive categories between bush and non-bush operations.[24]

12. Alascom does not provide adequate explanations of cost categories, special studies or allocators. For example, the CAP contains four categories into which costs are grouped: operations; customer service; administration; and executive. Although Alascom explains the operations and customer service categories, it does not define the administration and executive categories. Alascom states that four cost pools within the customer service category (*i.e.*, customer service, operator service, media advertising, and sales promotion) are allocated between bush and non-bush activities based upon special studies, but it provides no details on how these special studies are conducted. Although Alascom mentions media advertising and sales promotion cost pools, neither of these cost pools are shown in any of the accounts. Alascom must revise its CAP to show the roles these cost pools play in allocating costs within accounts between bush and non-bush operations, or explain why they are mentioned in the description of the allocation process but are not used in the CAP.

13. Alascom states that it uses cost location codes to track network investment and expenses and to group costs into categories. Because these codes are an integral part of the allocation process, Alascom must explain how they are developed and applied. Although Alascom states that it analyzes these cost location codes to disaggregate its costs, it does not explain how it disaggregates its costs. In its revised CAP, Alascom must fully explain the steps it takes to group the costs in each account into categories using the cost location codes.

14. In Section III of the CAP, Alascom states that "an analysis of the cost location codes associated with each Part 32 account and subaccount in the Operations category provides the information necessary to assign costs to bush and non-bush objectives."[25] This statement implies that through an analysis of cost location codes Alascom can directly assign its operations costs. The majority of cost pools in the operations category, however, are apportioned between bush and non-bush locations using an allocator. Therefore, Alascom must clarify what it means by this statement and identify precisely what operations costs will be directly assigned.

15. Alascom's Operations Apportionment Table does not provide sufficient information for us to determine if Alascom's allocation methods can prevent cross-subsidy. To correct this, Alascom must take several steps. First, Alascom must clearly define its cost pools, describe the plant for which associated costs are included in each cost pool, and explain the plant's function within the network. Second, Alascom must explain how it identifies and assigns costs to pools. Third, Alascom must explain how it derives the various bush/non-bush allocators. If Alascom develops these allocators based upon special studies or other methods, it must fully explain them.

2) Nonregulated Costs

16. We are concerned that Alascom may be including costs of its nonregulated operations in its bush/non-bush allocation process. In Section I-2 of the CAP Alascom states that the CAP is applied to Alascom's regulated account balances after removal of Alascom's nonregulated costs. The CAP, however, includes the allocation of Account 1406, Nonregulated investment. In this account the carrier records investment in nonregulated activities that do not involve the joint or common use of regulated assets and resources. Alascom must demonstrate that all nonregulated costs are excluded from its processes for allocating costs between bush and non-bush operations.

3) Direct Assignment

17. In the CAP, Alascom has one cost pool that it states that it assigns directly to both bush and non-bush operations. This is the terminal end point cost pool shown on the operations apportionment table. We have several concerns related to Alascom's direct assignment of costs. First, Alascom's treatment of terminal end point costs would be more clear if the CAP listed two terminal end point cost pools, one directly assigned to bush and one directly as-

terminal end points include satellite earth stations, microwave ratio stations, and related facilities, providing service to and from Alaskan communities." *See* Alascom Reply at 6-8.

[22] *Id.* at 13.

[23] *Id.* at 14-15.

[24] Alascom uses two "general allocators", one for investment accounts and one for expense accounts. *See* Alascom CAP, page IV-1. It is not clear from Alascom's definition exactly how it computes these general allocators. Alascom's approach, however, differs from the Commission's general allocator prescribed by the Joint Cost rules. *See supra*. n.8.

[25] Alascom CAP, page III-2.

signed to non-bush. Second, Alascom claims that it uses cost location codes to identify network investment and expenses by location and function. Yet it only uses direct assignment for twenty percent of its costs.[26] In view of its use of cost location codes, we believe that Alascom may be able to directly assign additional costs that it may be including in common cost pools. We direct Alascom to review its allocation process to determine whether it can increase its use of direct assignment. If it can, we direct it to do so. If it cannot, we direct it to include in the CAP a detailed explanation of why its allocation process produces limited direct assignment. Although Alascom claims that it maximizes the direct assignment of costs and divides its costs of service into bush, non-bush and common,[27] we believe that Alascom should make additional efforts to identify and increase the proportion of costs it directly assigns to either its bush or non-bush operations. Alascom may have to restructure its cost allocation process in order to increase its level of direct assignment.

4) Aurora II Satellite and Affiliate Transactions

18. The CAP contains no information on affiliate transactions and no information on the operating lease related to the Aurora II Satellite. The Alaska Joint Board recommended that the Commission monitor these two areas. We cannot, however, begin to monitor these areas until Alascom's CAP contains information concerning them. Alascom must revise its CAP to include a section discussing its affiliate transactions. In this new section, Alascom must describe the nature, terms and frequency of its affiliate transactions. Alascom must also revise its CAP to explain how it allocates costs related to the operating lease of the Aurora II Satellite between its bush and non-bush locations.

5) Categorization of Bush and Non-bush Locations

19. In view of GCI's comments that Alascom incorrectly categorized certain earth stations as bush and Alascom's admission that it incorrectly categorized three sites, we direct Alascom to revise this section of its CAP. Alascom must revise its CAP to justify the sites it includes as bush and to remove any sites from its list of bush locations that do not qualify as facilities monopolies as defined by the Joint Board.

IV. CONCLUSION

20. Based on our review of Alascom's CAP, we conclude that the CAP contains major deficiencies. We, therefore, require Alascom to submit a revised CAP that addresses the issues raised in this Order. In its revised CAP, Alascom must: 1) explain in detail each of its cost apportionment procedures and define each term used in its cost allocation process; 2) provide information to show that costs associated with its nonregulated activities are segregated from the costs under consideration here; 3) revise its procedures in order to increase the level of direct assignment of costs; 4) provide specified information on the Aurora II Satellite that Alascom leases for use in its operations; 5) provide specified information on its affiliate transactions; and 6) review its list of bush and non-bush locations for compliance with the Commission's definition of these sites. We will provide interested parties with an opportunity to comment on Alascom's revised CAP. We will evaluate the revised CAP, as well as the comments that we receive, before issuing a further order on Alascom's CAP.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4(i), 4(j), 201-204, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-204, and 220, and authority delegated under Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, Alascom's Cost Accounting Plan IS REJECTED.

22. IT IS FURTHER ORDERED, that pursuant to authority contained in Sections 1, 4(i), 4(j), 201-204, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-204, and 220, and authority delegated under Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, Alascom, Inc. SHALL SUBMIT a revised Cost Allocation Plan incorporating the items discussed in this Order within sixty (60) days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

[26] *See supra*, para. 9.
[27] Alascom CAP pages I-1 & III-1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Louisiana TV Broadcast Corporation, Baton Rouge, LA — CSR-4097-A

For Modification of Television Broadcast Station WBRZ's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995 **Released: May 4, 1995**

By the Cable Services Bureau:

I. INTRODUCTION

1. In the captioned proceeding, Louisiana TV Broadcast Corporation ("WBRZ"), licensee of television station WBRZ, Baton Rouge, Louisiana (ABC, Channel 2), has requested the Commission to include 11 communities in the Tangipahoa Parish (the "Communities") within the Baton Rouge, Louisiana "area of dominant influence" ("ADI") for purposes of the cable television mandatory broadcast signal carriage rules.[1] Rampart Operating Partnership, licensee of WWL-TV, New Orleans, Louisiana (CBS, Channel 4) ("Rampart") has filed an opposition to WBRZ's petition. WBRZ has filed reply comments to the opposition and a supplement to its reply comments.

II. BACKGROUND

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order*, Docket 92-259,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market con-

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[1] The 11 communities in the Tangipahoa Parish are: Loranger, Sweetwater, Independence, Amite, Hammond, Natalbany, Tangipahoa, Kentwood, Ponchatoula, Tickfaw, and Roseland.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Report and Order*, MM Docket 92-259, 8 FCC Rcd 2965, 2976-2977 (1993) (*"Must Carry Order"*).

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

[6] Communications Act of 1934, as amended, § 614 (h)(1)(C)(ii), 47 U.S.C. § 534(h)(1)(C)(ii).

sistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

III. MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue in this proceeding are located in Tangipahoa Parish, Louisiana, which is part of the New Orleans, Louisiana ADI. WBRZ is located in Baton Rouge, Louisiana in the Baton Rouge, Louisiana ADI. Tangipahoa Parish borders the Baton Rouge ADI to the east. In its petition, WBRZ asks the Commission to modify its ADI so that 11 communities in Tangipahoa Parish may also be included in the Baton Rouge ADI for purposes of the cable television mandatory broadcast signal carriage rules.

9. WBRZ asserts that it satisfies each of the four market modification criteria set forth in the 1992 Cable Act and the Commission's rules. The petitioner states that it has been historically carried on the various cable systems serving the 11 communities. Specifically, WBRZ asserts that it has been carried on both Capital Cablevision-Loranger and Rural Cablevision-Independence since 1989, on Parish Cablevision-Hammond since 1974, and on Vista Communications-Kentwood since 1981.[12] The petitioner maintains that it provides coverage and local service to the communities at issue. WBRZ submits a contour map showing that it places a Grade B contour over all of the Communities. In addition, the petitioner provides a program log, listing stories aired in 1992-93 that are specific to Tangipahoa Parish and to a number of the Communities. As to the issue of whether other stations entitled to mandatory carriage provide local coverage to the communities at issue, WBRZ contends that none of the television stations in the New Orleans ADI, to which Tangipahoa Parish is currently assigned, provide Grade B coverage to all of Tangipahoa Parish. Finally, the petitioner argues that local viewing patterns justify inclusion of the Communities in the Baton Rouge ADI. WBRZ submits Arbitron cable county and

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[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 97 (1992).
[8] *Id.* at 2977 (emphasis in original).
[9] Must Carry Order, 8 FCC Rcd at 2977, n.139.
[10] 47 C.F.R. § 76.59.
[11] *Must Carry Order,* 8 FCC Rcd at 2981.
[12] The petitioner states that Parish Cablevision-Hammond serves the following communities: Amite, Hammond, Independence, Natalbany, Tangipahoa, Ponchatoula, Roseland and Tickfaw. It appears that Capital Cablevision-Loranger serves Loranger, that Rural Cablevision-Independence serves Sweetwater and that Vista Communications-Kentwood serves Kentwood.

non-cable county coverage reports for 1992-93, 1991 92, 1990-91 and 1989-90 which, it contends, demonstrate that the station achieves a significant audience share in both cable and non-cable homes in Tangipahoa Parish. The petitioner also asserts that it is significantly viewed in Tangipahoa Parish.

10. In its opposition to WBRZ, Rampart argues that the petitioner seeks "to import the significantly viewed' concept into the new signal carriage rules to accord it must-carry' status where it otherwise would not have it." Rampart warns that if the Commission grants the petitioner's ADI modification request based upon the fact that WBRZ is significantly viewed, it will open up a "floodgate of special relief requests" from television stations that are significantly viewed in communities outside of their own ADIs. Rampart argues that using the significantly viewed concept as the criteria for resolving ADI petitions runs counter to the general presumption that a station is local and eligible for mandatory carriage only with respect to those communities within its ADI. Rampart acknowledges that it may be appropriate to modify the television market for signal carriage purposes in certain cases and presents examples of these situations. However, Rampart argues that the examples it describes are fundamentally different from the situation in Tangipahoa Parish. Rampart contends that the "compact and adjacent nature" of the New Orleans and Baton Rouge markets permits viewers to watch signals from both markets, suggesting that an ADI modification is not necessary in this case because viewers in Tangipahoa Parish already have access to WBRZ. As to the issue of whether other stations entitled to mandatory carriage provide local coverage to the communities at issue, Rampart states that WWL-TV in New Orleans provides coverage of issues of concern to the Communities. Rampart submits a list of stories broadcast by WWL-TV in 1992 and 1993 concerning events in Tangipahoa Parish and a number of the Communities.

11. In response to Rampart's opposition, the petitioner explains that it does not seek to remove the 11 communities from the New Orleans ADI but, rather, to also include the 11 communities in the Baton Rouge ADI. WBRZ contends that there is ample evidence to support its request. The petitioner reiterates that it has been continuously carried by cable systems serving the Communities and that it provides Grade B contour coverage and local service to Tangipahoa Parish and the Communities. WBRZ also reasserts that none of the television stations licensed to the New Orleans ADI provide Grade B coverage to all of Tangipahoa Parish and that WBRZ achieves high viewing shares and is significantly viewed. In addition, the petitioner points out that Rampart does not dispute any of the facts presented in its petition but, rather, focuses solely on the significantly viewed component of WBRZ's showing. WBRZ further contends that the Commission is required to depart from the presumption in favor of ADI carriage in cases where the presumption would result in cable subscribers losing access to local stations because such stations are outside the ADI in which a local cable system operates.

12. In a supplement to its reply comments, WBRZ informs the Commission that the Tangipahoa Parish Council has voted unanimously to support the station's request to include the Communities within the Baton Rouge ADI. WBRZ submits a copy of a letter addressed to the Commission from the Tangipahoa Parish Council confirming this fact. In the letter, the Tangipahoa Parish Council further asserts that farming is the chief industry of Tangipahoa Parish and that farmers use WBRZ in Baton Rouge as their main source of weather information.

IV. ANALYSIS AND DECISION

13. WBRZ has provided sufficient evidence to justify its market modification request and it will accordingly be granted. The station has been continuously carried in most of the Communities since 1974 and in other Communities since 1981 or 1989. In addition, WBRZ places a Grade B contour over the Communities. With respect to local service, WBRZ has demonstrated that it covers issues specific to the Communities and to Tangipahoa Parish. A detailed log of local interest programming supports this conclusion as does a letter of endorsement from the Tangipahoa Parish Council. Rampart points out that WWL-TV in New Orleans also offers local programming to the Communities. However, we do not believe that Congress intended for the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. As to viewing patterns, the most recent Arbitron county coverage reports of 1993-94 confirm WBRZ's assertion that it achieves substantial viewership.[13] They show that WBRZ is the most watched ABC affiliate in Tangipahoa Parish and has a higher viewership share than four out of six stations in the New Orleans ADI.

V. ORDER

14. In view of the foregoing, we find that grant of WBRZ's petition with respect to the Communities in Tangipahoa Parish is in the public interest.[14]

15. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, (47 U.S.C. 534(h)(1)(C)) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), that the petition for special relief (CSR-4097-A), filed August 24, 1993 by Louisiana TV Broadcast Corporation IS GRANTED. WBRZ shall notify the relevant cable systems in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order.*

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[13] *New Orleans:* | *Total Share* | *Net Weekly Circulation*
WWL (CBS, Ch. 4) 26 77
WDSU (NBC, Ch. 6) 11 72
WVUE (ABC, Ch. 8) 6 51
WYES (PBS, Ch. 12) 1 19
WGNO (Indep. Ch. 26) 4 42
WNOL (FOX, Ch. 38) 5 46

Baton Rouge:
WBRZ (ABC, Ch. 2) 9 63
WAFB (CBS, Ch. 9) 13 65
WLPB (PBS, Ch. 27) -- 7
WVLA (NBC, Ch. 33) 2 31
WGMB (FOX, Ch. 44) -- 4

[14] The Tangipahoa Parish Communities also remain within the New Orleans, Louisiana, ADI.

The affected cable systems shall come into compliance with the applicable rules within sixty (60) days of such notification.

16. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Maine Public Broadcasting Corporation against United Video Cablevision, Inc. Request for Carriage	CSR 4447-M

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995 **Released: May 4, 1995**

By the Cable Services Bureau:

I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992(Cable Act) became law.[1] On March 11, 1993 the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] On January 6, 1995, Maine Public Broadcasting Corporation ("MPBC"), licensee of Station W39BQ (Educ., Channel 39), Lewiston, Maine, filed a petition with the Commission claiming that United Video Cablevision, Inc. ("UVCI"), operator of cable television systems serving the communities of Greene, Leeds, Minot, Poland, Turner Wales, Durham, and Woolwich, Maine had declined to carry the station.[3] In its petition, MPBC claims that UVCI declined to carry the station even though it is a "qualified noncommercial educational television station" entitled to carriage pursuant to §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). An opposition to this petition was filed February 13, 1995, on behalf of UVCI.

2. According to petitioner, TV translator station W39BQ is licensed to MPBC, a 501(c)(3) corporation operating noncommercial educational TV stations in the State of Maine. Station W39BQ translates the signal of full-power noncommercial educational TV Station WMEA-TV (Educ., Channel 26), Biddeford, Maine, and operates with effective radiated power of 9.2 kilowatts.[4]

II. SUMMARY OF PLEADINGS

3. In support of its petition, MPBC indicates that despite previous correspondence regarding channel position and other issues, UVCI indicated on November 4, 1994 that it would not carry W39BQ because the station did not meet the criteria for must-carry rights of Low Power Television ("LPTV") stations. By letter dated November 9, 1994, MPBC explained to UVCI that it was no longer an LPTV station, but that effective February 22, 1994 it began operating as a TV translator station rebroadcasting Station WMEA-TV's PLUS Service, and, as such, is eligible for must-carry rights as a qualified noncommercial educational translator station.[5] Further, W39BQ maintains that it is entitled to carriage because it places a Grade B contour over respondent's principal headend.

4. In its opposition, UVCI states that MPBC's petition should be dismissed because UVCI is in full compliance with the Commission's must carry rules. UVCI does not dispute that W39BQ is currently operating as a translator station. Nevertheless, UVCI claims that W39BQ is not entitled to carriage in eitherDurham or Woolwich, Maine.[6] UVCI contends that its system serving Durham is already carrying the translator's parent station, WMEA-TV, and therefore UVCI does not also have to carry W39BQ on that system. Regarding Woolwich, UVCI argues that W39BQ does not provide a good quality or Grade B signal to the system headend which serves that community. UVCI states that it is providing to MPBC information regarding its technical tests of the translator signal which demonstrate that W39BQ is not a must-carry signal in Woolwich. [7]

III. DISCUSSION

5. Initially, it is important to note that noncommercial translator stations, such as W39BQ, have signal carriage rights.[8] Congress determined that translators should be carried because they are particularly important to state public television networks, like MPBC, in extending television signals to rural areas that are located far from the principal communities of the main station.[9] A review of the Commission's license file for W39BQ confirms that it is operating as a translator station. However, based on the totality of

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order in MM Docket 92-259*, 8 FCC Rcd 2965 (1993). *See also Clarification Order*, 58 FR 32449 (June 10, 1993). 47 U.S.C. §535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994) (remand of District Court opinion that must-carry provision of 1992 Cable Act is constitutional).

[3] In its response, UVCI states that it is proceeding to obtain the equipment necessary to enable it to receive and carry W39BQ in Greene, Leeds, Wales, Turner, Minot and Poland. UVCI states that it anticipates it will have all necessary equipment to add the station to these systems by the end of March, 1995. Therefore, regarding these communities, W39BQ's must-carry rights are not at issue.

[4] Petition at 2.

[5] MPBC explains that on November 30, 1993, the FCC granted MPBC authority to construct a new LPTV on Channel 39 in Lewiston, Maine. The station, W39BQ, commenced operations on December 30, 1993 as an LPTV station. In February 1994, MPBC notified the FCC that W39BQ would operate as a TV Translator Station, rebroadcasting Station WMEA-TV's PLUS Service. MPBC's initial letter requesting carriage on UVCI's systems at issue here predated its switch to TV Translator status. *See* Petition at 2-4.

[6] UVCI's system which serves Durham also serves Freeport, Maine. However, MPBC's petition does not request carriage in Freeport. Response at 2.

[7] The record does not include a copy of these test results. *See* paragraph 6, *infra*, explaining that the coverage area of a translator station is its predicted protected contour.

[8] 47 U.S.C §535(l)(1); 47 C.F.R. §76.55(a)(3)(i). *See Memorandum Opinion and Order in MM Docket 92-259*, 9 FCC Rcd 6723, 6724 (1994).

[9] *See* H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 104 (1992)(Including translators in the definition of qualified noncommercial educational stations ensures carriage by cable systems in remote areas not served by the primary public television licensee).

evidence, we find that W39BQ is not a qualified *local* noncommercial educational translator station serving Durham and Woolwich, Maine, and, consequently, it is not entitled to carriage in the subject communities.

6. As stated previously, under the 1992 Cable Act and the Commission's must-carry rules, cable operators are required to carry the signals of qualified local NCE translator stations. For purposes of must-carry rights, a translator of any NCE station is considered a qualified local NCE station if the translator: (1) operates with five watts of power or higher; (2) serves the franchise area; and (3) delivers a good quality signal over the cable system's principal headend. Although W39BQ's petition states that it places a Grade B contour over UVCI's principal headend, this condition does not apply to translator stations. Because the service area of a translator differs from that of a full power broadcast station, the Commission has held that, for purposes of finding that a translator station serves a cable system's franchise area, the coverage area of such translator shall be its predicted *protected* contour as specified in §74.707 of the rules.[10]

7. Having concluded that the parties were applying an incorrect standard, we attempted to review the facts based on information from the Commission's files. The W39BQ transmitter is located at latitude 44°09'16" longitude 70°00'37", in Litchfield, Maine, and has a predicted protected contour calculated as specified in §74.707 that extends out approximately 16 miles from the transmitter. According to our calculations, Litchfield is 19 miles from Woolwich. Accordingly, it appears that W39BQ's predicted protected contour does not encompass Woolwich. With respect to Durham, Maine, we note that this community is more removed from W39BQ's location than Woolwich, Thus, we cannot find that W39BQ is local to the communities of Woolwich or Durham, Maine.[11] Accordingly, W39BQ is not a qualified local NCE translator station serving Woolwich or Durham, Maine, and thus it is not entitled to carriage in these communities.

IV. ORDER

8. Accordingly, IT IS ORDERED, pursuant to §615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended, that the petition filed January 6, 1995 by Maine Public Broadcasting Corporation IS DENIED.

9. This action is taken pursuant to authority delegated by section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[10] 47 U.S.C §535(l); 47 C.F.R. §76.55(a)(3)(1). *See Memorandum Opinion and Order*, 9 FCC Rcd at 6724.

[11] Given this conclusion we need not address UVCI's argument that it is relieved from carrying W39BQ in Durham because it already carries W39BQ's parent station, WMEA-TV,

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-309

In re Applications of

LOS AMIGOS MEDIA, A LIMITED PARTNERSHIP	File No. BPH-900122MM
KIMLER BROADCASTING, INC.	File No. BPH-900122MN
ARTISTIC AIRWAVE BROADCASTERS	File No. BPH-900122MP
LAURA WILKINSON HERRON	File No. BPH-900122MY

For Construction Permit for a
New FM Station, Channel 233A
Temecula, California

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 1995; Released: May 5, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. On March 30, 1995, two of the four remaining applicants in this comparative proceeding filed a joint petition for approval of joint settlement agreement, which was supplemented on April 4, 1995. The Mass Media Bureau's comments, filed April 12, 1995, support the joint request because it complies with the requirements of the Communications Act, 47 USC 311(c)(3), and the implementing Commission Rule, 47 CFR 73.3525(a). We grant the joint petition for the reasons set out below.

2. Artistic Airwave Broadcasters and Los Amigos Media, a Limited Partnership, seek Board approval of their settlement agreement. Los Amigos has agreed to dismiss its application and in return Artistic Airwave will, subject to Commission approval, pay Los Amigos a sum of $15,000, an amount less than Los Amigos' total legitimate and prudent expenses. As required by Section 73.3525(a), the applicants have shown that: (a) their applications were not filed for the purpose of entering in a settlement agreement; (b) the amount of reimbursement is less than the dismissing applicant's legitimate and prudent expenses; and (c) the settlement is in the public interest because it would conserve the Commission's scarce resources by reducing this comparative proceeding to only three parties. We agree with the Bureau that approval of the agreement will serve the public interest. *See Settlement Agreements*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC 2901, 2902 (1991), and *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373 ¶ 5 (1980).

3. ACCORDINGLY, IT IS ORDERED, That the motion to reopen the record and enlarge the issues against Los Amigos Media, a Limited Partnership, filed March 1, 1995, and withdrawal of that motion, filed March 29, 1995, by Artistic Airwave Broadcasters, ARE DISMISSED;

4. IT IS FURTHER ORDERED, That the joint petition for approval of joint settlement agreement filed by Artistic Airwave Broadcasters and Los Amigos Media on March 30, 1995, and supplemented on April 4, 1995, IS GRANTED, that the agreement IS APPROVED; and, that the application of Los Amigos Media, A Limited Partnership (File No. BPH-900122MM) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr., d/b/a REM MALLOY BROADCASTING	File No. BPH-880627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L. Baker, d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC. For Construction Permit for New FM Station, Channel 275A, Raleigh, North Carolina	File No. BPH-860703MH

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 1995; Released: May 5, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it for consideration: (1) an Appeal filed February 27, 1995, by Free Air Corporation from a *Memorandum Opinion and Order*, FCC 95M-60, released February 23, 1995, (*MO&O*), by Administrative Law Judge Joseph Chachkin (ALJ), dismissing Free Air's application; and (2) Free Air's Motion to Stay filed on the same date requesting a stay of the effectiveness of the above order. Joint Oppositions to the Appeal and Motion to Stay were filed on March 3, 1995, by Peebles Broadcasting Company, Interactive Media, and Bernard Dawson. For the reasons set forth below, we will deny the appeal and dismiss the stay as moot.

2. On a joint motion to dismiss filed February 3, 1995, by all of the opposing applicants, the ALJ dismissed Free Air's application for failure to prosecute because Free Air elected not to exchange any direct evidence on a financial qualifications issue designated against it or to appear at the January 31, 1995 hearing scheduled for trial of the issue. That issue, along with a basic qualifying issue against Rem Malloy Broadcasting, had been added by the Board on September 12, 1994, in an order remanding the case to the ALJ. *Memorandum Opinion and Order*, 9 FCC Rcd 4822 (Rev. Bd. 1994), *pet. for extraordinary relief dismissed*, 10 FCC Rcd 503 (1995). At a conference held on November 2, 1994, the ALJ extended the procedural schedule previously established in this case, after counsel for Free Air produced an October 1994 physician's affidavit averring that Olga Castellanos, Free Air's fifty percent owner, was recovering from breast cancer surgery performed on October 17 and would not be able to appear for deposition until the latter part of December 1994. *MO&O* at ¶ 2. In moving to dismiss the remanded issue, Free Air had claimed that Castellanos was the principal solely responsible for Free Air's financial certification.[1] The ALJ also denied a subsequent joint motion for continuance filed by two other applicants, who complained they had been unable to depose Castellanos. Although Free Air supported the motion, it offered no documentation of Castellanos' medical condition, and the ALJ saw no reason to delay the hearing relative to Rem Malloy. *Memorandum Opinion and Order*, FCC 95M-4, released January 9, 1995. Notwithstanding the ALJ's extension of the original procedural dates to accommodate Castellanos, Free Air did not exchange its direct case exhibits on January 17, 1995, the revised date set for the exchange of exhibits. Instead, on that date, Free Air filed a motion to delete the financial issue specified by the Board, asserting that Castellanos would be unable to testify at hearing and that Free Air would rest its case on the motion to delete. *Id.* at ¶ 4. Free Air again offered no medical certificate to support its opposition. Free Air did not attend the hearing, which the ALJ had rescheduled to January 31, 1995. It submitted a letter to the ALJ on January 30 declaring that it would not be present at the hearing and repeating its representation that it would rest its case on the motion to delete. *Id.* The ALJ refused to grant the motion to delete because substantial questions of fact remained to be resolved. *Memorandum Opinion and Order*, FCC 95M-48, released February 14, 1995.

3. In dismissing Free Air's application, the ALJ held that Free Air's proffered justification centering on Castellanos' health provided no valid excuse for its failure to comply with his order. *MO&O* at ¶ 8. He stated that "Castellanos' health did not explain Free Air's failure to exchange its direct case" nor did it "explain Free Air's unwillingness to offer the testimony of other essential witnesses." *Id.* Free Air never sought a continuance predicated on Castellanos' health or other grounds, nor did it submit a further medical report on Castellanos' health after the doctor's statement of October 1994. *Id.* & n.8. The ALJ concluded that the proffered justification was a pretext and that "Free Air's real reason for not offering evidence on the financial issue added by the Board [was] its unwillingness to subject its financial showing to the scrutiny of its opponents." *Id.* at ¶ 8. The ALJ also rejected Free Air's argument that denial of the application, rather than its dismissal, was the

[1] In remanding the financial qualifications issue against Free Air, the Board had assumed that Free Air's other principal was at least partially responsible for Free Air's financing, but the specified issue required Free Air to demonstrate the *applicant's* qualifications at the time of certification and subsequently.

appropriate course of action if an applicant had no reasonable excuse for not appearing at hearing. *Id.* at ¶ 9. Finally, he analyzed Free Air's putative misconduct under the standards for dismissal set forth by the Court of Appeals for the District of Columbia Circuit in *Comuni-Center Broadcasting, Inc. v. FCC*, 856 8F. 2d 1551, 1554 (D.C. Cir. 1988),[2] stating:

> [G]iven the fact that Free Air has already been afforded an opportunity to come forward with the evidence to meet its burden on the issue added by the Board, which it has spurned, burdening the administrative system further with its application would be an unconscionable waste of the Commission's time and resources. Also, there would be manifest prejudice to Free Air's opponents if they were required to participate in yet another hearing session on Free Air's financial qualifications merely because Free Air defied the Presiding Judge's procedural order. Finally, dismissal of Free Air's application serves the public interest since it will have a deterrent effect on counsel who defy ALJ orders.

MO&O at ¶ 11.

4. Free Air contends in its appeal, citing *GAF Broadcasting Co.*, 96 FCC 2d 411 (Rev. Bd. 1984), that "the dismissal of an application is not warranted where the purported failure to prosecute results from a principal of the applicant not testifying because of a medical problem and where the ALJ had refused to grant a continuance on the basis of such medical problem." Br. at 3. Free Air argues that, because the ALJ had already denied a continuance, "it would have been futile for Free Air to make another request or to submit an additional affidavit from a doctor." *Id.* at 4. It also argues that it would have been "futile" to submit a partial case since the ALJ considered Castellanos to be an essential witness, and thus, perforce, it had no choice but to prosecute its case through a motion to delete the financial issue. *Id.* Free Air's final contention is that there is no factual or legal basis to dismiss its application. Br. at 5.

5. *Discussion.* Free Air's reliance on *GAF* for reinstatement of its application is misplaced. There, the presiding ALJ refused to allow a continuance of the hearing where it was alleged that an essential witness, who had been taken ill during his testimony, was unavailable to continue testifying because of poor health. The request for the continuance was supported by a letter from the witness' physician stating that the witness could not testify until the end of summer, and the physician had sent a telegram advising the ALJ he had ordered his patient not to testify at the scheduled hearing. The Board held that the ALJ's ruling was arbitrary and an abuse of discretion. 96 FCC 2d at 413 ¶ 5. Additionally, the *GAF* applicant had diligently continued to pursue its application, first by submitting the witness, and when he was unable to finish his testimony and the ALJ would not continue the case, by attempting to proceed on schedule with a substitute witness to sponsor the financial exhibit. Here, in contrast, Free Air never sought a continuance or submitted a status update of Castellanos' condition, and it made no attempt to pursue its application by meeting the issue.

6. A presiding ALJ has broad discretion in regulating the course of a hearing and will be overturned only if his ruling is arbitrary or an abuse of discretion. *See GAF Broadcasting*, 96 FCC 2d at 413. In disallowing the continuance sought by the other parties, the ALJ noted that the proponents seeking the continuance failed to make a showing for delaying the hearing concerning Rem Malloy. FCC 95M-4 at ¶ 6. Free Air's argument that it would have been "futile" for it to ask for a continuance or to submit an affidavit from the physician is disingenuous. The ALJ had demonstrated at the November 2 conference that he was amenable to suggestions from the parties concerning various courses of action that would resolve the financial issue against Free Air in an orderly and timely fashion and not jeopardize Castellanos' health. He extended his original procedural dates by adding in the recovery time estimated by Castellanos' physician before she could be deposed. He suggested that the parties contact Castellanos' physician to determine when it would be permissible to take Castellanos' deposition and recommended they might be able to minimize the time and burden of the deposition by deposing Castellanos at her Florida home. Tr. 2522-23. He asked the parties for their views about commencing the hearing toward the end of January or early February 1995 and received no objection from counsel for Free Air. Tr. 2527-28. Having failed to seek a continuance or to submit any updated information from Castellanos' physician on Castellanos' physical condition, Free Air can not complain on appeal that the ALJ's denial of the other parties' request for a continuance -- based on Free Air's failure to cooperate with Castellanos' deposition -- was arbitrary or an abuse of discretion.

7. Finally, Free Air's argument that it would have been "futile" to submit a partial case and that it had no choice but to seek deletion of the issue is also without merit. Other than the bare statement that Castellanos was considered an "essential" witness, Free Air, as noted by the ALJ, offered no explanation why it could not exchange its direct case or offer the testimony of other witnesses. In the *Memorandum Opinion and Order*, 10 FCC Rcd 503, *supra*, dismissing Free Air's and Rem Malloy's requests for extraordinary relief seeking reversal of our order adding the issues, the Commission pointed out that "a party may request relief pursuant to summary decision procedures before the ALJ to correct any alleged factual errors underlying the Board's determination to add financial issues against these applicants." 10 FCC Rcd at 505 ¶ 11. The ALJ found it baffling, in dismissing Free Air's motion to delete, that Free Air failed to avail itself of the summary decision procedures, but noted that, in any event, if a summary decision motion had been based only on the attachments to the motion to delete, it could not have been granted because the attachments showed there are genuine issues of material fact for determination at a hearing. *Memorandum Opinion and Order*, FCC 95M-48, *supra*, at n.3. From our own review of that showing, we agree there

[2] The criteria cited by the court consisted of the applicant's proffered justification for the failure to comply with the presiding officer's order; the prejudice suffered by other parties; the burden placed on the administrative system; and the need to punish abuse of the system and to deter future misconduct.

was ample basis for the ALJ to find that substantial and material questions of fact continued to exist as to Free Air's financial qualifications. Finally, the ALJ persuasively explained in detail how his dismissal ruling satisfied the factors enumerated in *Comuni-Center* in determining whether dismissal is warranted.[3] His action dismissing Free Air's application rather than simply denying it fully comports with Commission precedent. *See, e.g., Beth Knight,* 7 FCC Rcd 1889 (Rev. Bd. 1992) (application dismissed where applicant indicated it would not present evidence on issue allegedly wrongly added); *review denied,* 7 FCC Rcd 5975.[4]

8. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed February 27, 1995, by Free Air Corporation IS DENIED; and that Free Air's Motion to Stay filed on the same date IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[3] The ALJ found *Innovative Women's Media Association v. FCC,* 16 F.3d 1287 (D.C. Cir. 1994), cited by Free Air, inapposite. We agree with the ALJ's conclusion that *Innovative* is not apposite. There, the applicant's failure to meet the exchange deadline and attend the hearing was attributable to the absence of counsel.

[4] Free Air alleges in passing that the joint motion to dismiss Free Air's application was not properly signed and thus was required to be dismissed. We perceive no need to disturb the ALJ's ruling in this regard. *MO&O* at ¶ 10.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Released: May 5, 1995

Le Sea Broadcasting Corporation 1800E
Licensee, WHKE(TV), Kenosha, WI
P.O. Box 12
South Bend, IN 46624

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand five hundred dollars ($7,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. The Commission also reaffirmed and clarified its long-standing policy that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a "program-length commercial"). *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On August 3, 1992, you filed an application for renewal of license (FCC Form 303-S) for Station WHKE(TV), Kenosha, WI (File No. BRCT-920803LF). In a supplement to FCC Form 303-S you indicate that during the previous license term WHKE(TV) had failed to comply with the limitations on commercial matter in that many of the children's programs broadcast by WHKE(TV) "are provided by independent program suppliers complete with commercial and other promotional announcements", and that the station's standard policy and procedure require the master control operator to preview children's programs and delete any commercial or promotional announcements containing material related to the program. However, Exhibit 3 further states that, despite this standard policy, WHKE(TV) broadcast children's programs containing commercial or promotional matter related to those programs on four occasions between January 4, 1992 and March 2, 1992. In an amendment to WHKE(TV)'s renewal application dated February 21, 1995, you state that further investigation of one of those instances indicates that "no spot announcement aired during this program was related to program content", and, therefore, that program did not constitute a violation of the limits on commercial matter in children's programming.

During the license term in question, after the children's programming commercial limitations became effective, WHKE(TV) exceeded those limitations on 3 occasions, all program-length commercials. This record constitutes a repeated violation of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, Le Sea Broadcasting Corporation is hereby advised of its apparent liability for forfeiture in the amount of seven thousand five hundred dollars ($7,500) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)("*Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (adopted March 10, 1995, released April 5, 1995,

When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. The three program-length commercials described in WHKE(TV)'s renewal application, as amended, clearly indicate that WHKE(TV) did not initially establish an effective program to monitor compliance with the Commission's limits on commercial matter in children's programming. Further, Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs. S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989). Overages of this nature and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. The only reason for the cited violations proffered by WHKE(TV), human error, does not justify or excuse such violations. Finally, the fact that now WHKE(TV) may have implemented a plan to prevent future violations of the Commission's children's television commercial limitations does not relieve the licensee of liability for violations which have occurred. *International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $7,500.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WHKE(TV) would serve the public interest, convenience and necessity. Therefore, the license renewal application of Le Sea Broadcasting Corporation, File No. BRCT-920803LF, for Station WHKE(TV), Kenosha, WI, IS HEREBY GRANTED for a term to end on December 1, 1997.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: John E. Fiorini III, Esq.

FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Released: May 5, 1995

WHP Television, L.P. 1800E
3300 N. Sixth Street
Harrisburg, PA 17110

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, 47 C.F.R. §0.283, for repeated violations of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming, and to consider in its review of television license renewals the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, 47 C.F.R. §73.670, which limits the amount of commercial matter which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. *Children's Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529, 5530 (1991).

On March 31, 1994, you filed an application for renewal of license (FCC Form 303-S) for station WHP-TV, Harrisburg, PA (File No. BRCT-940331KK). In answer to Section II, Question 10(b) of that renewal application you state that during the previous license term WHP-TV did comply with the limitations on commercial matter in children's programming specified in Section 73.670 of the Commission's Rules. In Exhibit 5 to your application you state that WHP Television, L.P. acquired WHP-TV on September 30, 1993; that the records maintained by the previous licensee indicate that the limits on commercial matter in children's programming were exceeded on five occasions; that all of those violations predate your acquisition of the license; and that no violations of the commercial limits on children's television programs had occurred since your acquisition of the license. However, on July 28, 1994, you filed an amendment to your license renewal application which consisted of a supplement to Exhibit 5 to your renewal application. In the amendment/supplement, you state that a review of station operations conducted after the filing of the renewal application revealed "several additional apparent violations." Specifically, you state that between October 4, 1993, and December 3, 1993, WHP-TV exceeded the commercial limits on children's programming on 38 occasions. Of these 38 commercial overages, one was three minutes in length; eight were between two and three minutes in length; 21 were between one and two minutes in length; seven were between one-half and one minutes in length, and one was four seconds in length. You state that, immediately upon the discovery of these children's television commercial overages on December 3, 1993, the "traffic department" was "instructed... on proper compliance with the commercial limits"; and that since December 4, 1993, there have been no further violations.

WHP-TV's record during the last license term of exceeding the Commission's commercial limits on children's television programming on 38 occasions constitutes a willful and repeated violation of Section 73.670 of the Commission's rules. Accordingly, pursuant to Section 503(b) of the Communications Act, WHP Television, L.P., is hereby advised of its apparent liability for forfeiture in the amount of fifteen thousand dollars ($15,000) for its apparent repeated violation of Section 73.670 of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act, and, in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); *KXRM Partnership*, 8 FCC Rcd 7890 (1993).[1]

[1] A recent decision by the U.S. Court of Appeals for the District of Columbia set aside *Policy Statement - Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993)("*Policy Statement/Assessing Forfeitures*"), which the Commission has used since 1991 as a guideline for assessing forfeitures. In *United States Telephone Ass'n. v. FCC*, 28 F3rd 1232 (D.C. Cir. 1994), the court indicated that the guidelines established in *Policy Statement/Assessing Forfeitures, supra*, must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the Court's Order in a separate proceeding. While the criteria considered in connection with commercial overages in children's programming were developed in cases decided under *Policy Statement/Assessing Forfeitures, id.*, they were not inherently tied to *Policy Statement/Assessing Forfeitures, id.* Without regard to *Policy Statement/Assessing Forfeitures, id.*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming, since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability", as required under §503(b)(2)(D) of the Communications Act. *See Clear Channel Television, Inc. (KTTU(TV))*, 10 FCC Rcd 3773 (adopted March 10, 1995, released April 5, 1995,

The 38 occasions on which WHP-TV exceeded the hourly limits on commercial matter during children's programming is a high number of violations. Moreover, although eight of the overages were 59 seconds or less in duration, the remainder of the overages were over one minute in duration, and nine were over two minutes in duration. Overages of this frequency and magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children's Television Act of 1990. *Children's Television Programming, supra* 6 FCC Rcd at 2117-18. In addition, you provide no explanation whatever as to why the commercial overages occurred. When the Commission delayed the effective date of Section 73.670 of the Rules until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance...." *Children's Television Programming, supra* 6 FCC Rcd at 5530 n.10. In view of the violations which occurred after WHP Television, L.P., acquired the station license,[2] it is apparent that you did not have effective plans or procedures in place to prevent violations of the children's television commercial limits. Finally, the fact that WHP-TV may now have implemented a plan to prevent future commercial overages does not relieve the station of liability for violations which have occurred. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Consideration of all of these factors warrants a forfeiture in the above-specified amount of $15,000.

Notwithstanding the substantial nature of the violations described here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith, and we do not believe that the violations reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations raise a substantial and material question of fact as to whether grant of the license renewal application for Station WHP-TV would serve the public interest, convenience and necessity. Therefore, the license renewal application of WHP Television, L.P., File No. BRCT-940331KK, for Station WHP-TV, Harrisburg, PA, IS HEREBY GRANTED for a term to end on AUGUST 1, 1999.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80(f)(3). Other relevant provisions of Section 1.80(f)(3) of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosure

cc: Martin R. Leader, Esq.

FCC 95-108); *Northstar Television of Erie, Inc. (WSEE-TV)*, 10 FCC Rcd 3779 (adopted March 10, 1995, released April 5, 1995, FCC 95-109)

[2] WHP Television, L.P., is not responsible for violations which occurred prior to its acquisition of the license.

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-47

In the Matter of

Amendment of Part 95 of the Commission's Rules to allow Interactive Video and Data Service licensees to provide mobile service to subscribers	RM-8476

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1995; Released: May 5, 1995

Comment Date: June 26, 1995
Reply Comment Date: July 11, 1995

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose to amend Part 95 of the rules (47 C.F.R. Part 95) to allow Interactive Video and Data Service (IVDS) licensees to provide mobile service to subscribers on an ancillary basis. This proceeding was initiated by a petition for rule making (Petition), RM-8476, filed by EON Corporation (EON), on May 11, 1994.[1]

II. BACKGROUND

2. The IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service. IVDS licensees may provide information, products, or services to individual subscribers located at fixed locations within a service area, and subscribers may provide responses.[2] Under our current rules,[3] IVDS is classified as a fixed service. Accordingly, mobile operation of response transmitter units (RTUs) is not permitted.[4] The IVDS service rules were adopted in 1992 in GEN Docket No. 91-2.[5]

III. PETITION

3. In its petition, EON states that after the IVDS service rules were adopted,[6] it designed refinements[7] and a nationwide communications network capable of providing a variety of additional services to subscribers. Specifically, EON states that it has refined its technology and redesigned its system to use passive receive-only microcells which will relay the received RTU signal to the base station network via land lines. According to EON, the most significant benefit of this refinement is that the maximum transmitter power of all EON RTUs can be reduced to 100 milliwatts ERP.[8] EON argues that these refinements "eliminat[e] the need for the subscriber to remain near his or her television set or within an enclosure" to obtain service[9] and permits IVDS licensees to provide cost-effective mobile service.

4. Allowing low power mobile operation, according to EON, would benefit both IVDS licensees and consumers. It would permit IVDS licensees to provide new and innovative communication services.[10] EON states that services such as confirming a child's safety, or sending an electronic "come home now" message, will be possible.[11] Further, EON argues that consumers would benefit from lower costs[12] and increased access to IVDS systems.[13] EON contends that allowing mobile operation would "enhance the appeal and usefulness of IVDS to subscribers and ensure that the spectrum which the Commission has allocated for IVDS will be used to the fullest possible extent."[14]

5. EON states that, in addition to allowing improved service for both IVDS licensees and consumers, its new approach to IVDS will benefit broadcasters.[15] EON requests that we authorize mobile RTUs to transmit with a maximum effective radiated power (ERP) of only 100 milliwatts, compared to a maximum power of 20 watts currently authorized for fixed IVDS. EON contends that operating its system at this lower power will further reduce the interference potential to television channel 13. Further, EON argues that allowing mobile operation will increase the opportunity for broadcasters to provide valuable new services to consumers.[16]

6. Maximum Service Television, Inc., (MSTV) filed comments in support of EON's petition stating that it is satisfied that authorizing a low-power mobile capability will not

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[1] *See* Public Notice released May 19, 1994, Report No. 2011.

[2] Service offerings are determined by the licensee. Examples of service offerings that licensees could offer include opportunities for real-time responses to polls, educational or pay-per-view programming, and commercial data applications such as transmission of database information to point-of-sale terminals, home banking or downloading of data to personal computers, VCRs, or other consumer electronic products.

[3] 47 C.F.R. §§ 95.803(a), 95.805(e).

[4] An RTU is the transmitter used by a subscriber to interact with the IVDS system. Our current rules permit RTUs to operate inside a subscriber's residence, office or other fixed location and the RTUs need not be physically attached to a television set or computer.

[5] *Report and Order* in Gen Docket No. 91-2, 7 FCC Rcd 1630 (1992).

[6] EON petition at 1, 4.

[7] *Id.* at 5.

[8] Our rules permit RTUs to transmit with a maximum power of 20 watts.

[9] EON petition at 7.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 10. Specifically, EON states that the manufacturing costs of RTUs are expected to decrease due to the low power requirements. Consequently, the retail price of RTUs should be reduced.

[13] *Id.* at 7.

[14] *Id.* at 7-8.

[15] *Id.* at 7.

[16] *Id.* at 9.

increase the potential for interference to television reception, provided the existing regulatory safeguards are retained. Radio Telecom and Technology, Inc. (RTT) and ITV, Inc. (ITV) also filed comments in response to EON's petition. RTT argues that EON's proposal raises serious questions about the basic technical nature, interference potential, and ultimate use of IVDS. Further, it contends that the Commission should decide this matter pursuant to a notice-and-comment rule making proceeding. RTT also states that any power limits on IVDS mobile operation should be in terms of average power rather than peak power, because average power more accurately depicts interference potential.[17] ITV supports EON's petition, but notes that if mobile operation is allowed, the Commission will need to determine whether to regulate IVDS as a commercial mobile radio service. EON filed reply comments reiterating the benefits of mobile operation and noting support from MSTV.

IV. DISCUSSION

7. The Commission's primary objective in creating the IVDS was to satisfy demands for interactive communications between subscribers at fixed locations (*e.g.*, homes or offices) and video, data, or other service providers. Nonetheless, we believe that allowing IVDS licensees to use excess capacity to provide limited mobile services will enhance economic and spectrum efficiency, without impairing the purpose of the service. In addition, allowing IVDS licensees to provide ancillary mobile services would enhance telecommunication service offerings for consumers, producers, and new entrants, and encourage rapid deployment and growth of IVDS services.[18] Further, it would facilitate public access to telecommunication services. Finally, because of the low RTU power, mobile use is not anticipated to increase the interference potential to TV channel 13 reception.[19]

8. Therefore, we propose to amend Section 95.803(b) of the rules to permit IVDS licensees to provide ancillary mobile services to fixed service subscribers within their service area. We propose to permit transmissions from a cell transmitter station (CTS) to a fixed or mobile RTU and vice versa at any location within the service area. The primary use of the IVDS system, however, must be to provide subscribers at fixed locations with the capability to interact with video, data or other service providers. The offering to subscribers of mobile service only, such as paging or dispatch services, would not be permitted. Mobile service could be offered only to fixed service subscribers. As suggested by EON, we propose to limit the ERP of RTUs designed to operate as portables to 100 milliwatts. We specifically request comments regarding this proposed power limitation. We also request comments on the need to continue to authorize 20 watts power for fixed RTUs, given their apparent ability to operate at 100 milliwatts. With regard to this issue, we request comment on whether systems designed for mobile use by companies other than EON could have all RTUs--fixed and mobile--operate at 100 milliwatts.

9. Further, we propose to apply to mobile RTUs the existing 5-seconds-per-hour duty cycle limitation, as proposed by MSTV, to protect reception of TV channel 13. This limitation would effectively preclude IVDS from abandoning interactive communications. It appears that permitting ancillary mobile services would not result in IVDS licensees providing mobile services such as personal communications service.

10. In light of the above, we ask commenters to address specifically whether any restrictions should be placed on the types of ancillary mobile services that IVDS licensees would be permitted to offer. In responding to this issue, commenters should consider the rule specifying the maximum duty cycle of each RTU. *See* 47 C.F.R. § 95.863. For example, should allowing mobile RTU operations mean only that we are permitting subscribers at itinerant locations to access information, products or services or should we permit mobile-RTU-to-mobile-RTU communications through a cell transmitter station? Under this approach, the CTS would act merely as a "bent pipe" or "mobile relay." One RTU could page or send a message to another RTU without any interaction with a service provider. We propose to permit such indirect RTU-to-RTU interaction. Direct RTU to RTU transmissions would, however, remain prohibited.[20]

11. We recognize that the changes proposed herein follow completion of the first IVDS auction, pursuant to which 574 IVDS licenses were assigned. These licenses were auctioned subject to existing rules limiting their use to fixed operations. The public interest requires, however, that we retain the discretion and the responsibility to modify our service rules as the industry continues to evolve. The auction was the procedure we used to assign licenses among mutually exclusive applicants.[21]

12. In a separate Petition for Clarification, EON requests that we clarify that IVDS licensees can offer consumers the use of low power, mobile RTUs on a secondary, non-interference basis, pending the outcome of its petition for rule making.[22] EON states that there is precedent for allowing such secondary use when such use does not displace or interfere with the primary use of the spectrum and when it increases spectrum efficiency.[23] EON contends that adding mobility will enhance the appeal of IVDS to consumers, thereby generating additional revenues and cash flow and, as a result, help businesses meet build-out requirements.[24] RTT filed comments on EON's petition for clarification. RTT states that it does not object to mobile RTU operation if the issues are carefully considered in a rule making proceeding.[25] As we stated earlier, IVDS is a fixed service and mobile operation currently is not permitted, even on a secondary basis. We believe this issue must be decided through the rule making process, and have, therefore, initiated this present proceeding.

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[17] RTT comments at 2.

[18] This in turn will encourage economic and job growth.

[19] TV channel 13 operates in the lower adjacent band (210-216 MHz). Section 95.861 of the Commission's rules, 47 C.F.R. § 95.861, provides that IVDS systems must not cause harmful interference to television channel 13 reception.

[20] *See* 47 C.F.R. § 95.805(c).

[21] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993)(Budget Act); *see also* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 480-89 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1169-78.

[22] Petition for Clarification filed by EON on June 21, 1994.

[23] *Id.* at 2.

[24] *Id.* at 4.

[25] RTT comments at 1.

V. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

13. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

14. An initial Regulatory Flexibility Analysis is contained in Appendix A.

15. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Analysis in Appendix A, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612 (1981).

Comment Dates

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 26, 1995** and reply comments on or before **July 11, 1995**. To file formally in this proceeding, you must file an original and five copies of all comments and reply comments. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

Ordering Clause

17. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(b) and 303(r).

Further Information

18. For further information, contact Bill Cross or Donna Kanin at the Wireless Telecommunications Bureau, Private Radio Division (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachments

APPENDIX A

Initial Regulatory Flexibility Analysis

Reason for Action

The Commission proposes to amend Part 95 of its rules to allow ancillary portable operation in the Interactive Video and Data Service (IVDS). This change will allow IVDS licensees to provide new and innovative communication services and promote more efficient and flexible use of IVDS spectrum.

Objectives

The proposed rules will encourage rapid deployment and growth of IVDS systems and enhance telecommunications offerings for consumers, producers and new entrants.

Legal Basis

The proposed action is authorized under Sections 4(i), 303(r) and 307(c) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) and 307(c).

Report, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Small Entities Involved

The proposed rule change would benefit IVDS licensees by allowing them to provide new services. Most IVDS licensees are expected to be small entities.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

APPENDIX B

Part 95 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 95-Personal Radio Services

1. The authority citation for Part 95 would continue to read as follows:

Authority citation: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 95.803 is amended to read as follows:

§ 95.803 IVDS description.

(a) An IVDS system is a point-to-multipoint, multipoint-to-point, short distance communications service for its licensees to provide information, products, or services to, and allow interactive responses from, subscribers in the

licensee's service area. In addition to fixed operations, IVDS licensees may provide ancillary mobile services to fixed service subscribers.

(b) The components of each IVDS system are its administrative apparatus, its response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area. Each IVDS system is authorized for a specific service area and frequency segment. There can be a maximum of two IVDS systems per service area. There are two frequency segments available for each service area.

* * * * *

3. Section 95.805 is amended by revising paragraphs (c) and (e) to read as follows:

§ 95.805 Permissible communications.

* * * * *

(c) Direct RTU-to-RTU communications are prohibited. No RTU in an IVDS system may be interconnected with the public switched noetwork or any commercial mobile radio service.

(d)***

(e) An IVDS system may provide service to RTUs at any location within its service area.

* * * * *

4. Section 95.855 is amended by revising paragraph (a) to read as follows:

§ 95.855 Transmitter effective radiated power limitation.

(a) The effective radiated power (ERP) of each CTS and RTU shall be limited to the minimum necessary for successful communications. RTUs must incorporate automatic power control to ensure the minimum ERP is used. No CTS may transmit with an ERP exceeding 20 watts. No RTU that is designed to be used at a fixed location may transmit with an ERP exceeding 20 watts. No RTU that is designed to be used at itinerant locations may transmit with an ERP exceeding 100 milliwatts.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

NEWCITY COMMUNICATIONS OF MASSACHUSETTS, INC.
(Assignor)

and BPH-930405IC
BALH-930625GG
BLH-931223KA

WSB, INC.
(Assignee)

For Modification of Facilities, License to Cover Modified Facilities, and Assignment of License of WJZF(FM) (formerly WYAI) La Grange, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1995; Released: May 5, 1995

By the Commission: Comissioner Quello concurring and issuing a statement.

1. The Commission has under consideration an application for review filed on October 13, 1993, by Jacor Broadcasting of Atlanta, Inc. ("Jacor"), licensee of stations WGST(AM) and WPCH(FM), Atlanta, Georgia. Jacor requests review of the action by the Chief, Audio Services Division by letter dated August 11, 1993, which denied its informal objection and granted the above-referenced application for a construction permit to modify the facilities of station WJZF(FM) (formerly WYAI), La Grange, Georgia.[1] Also before the Commission are an application to assign the license of WJZF from NewCity Communications of Massachusetts, Inc. ("NewCity") to WSB, Inc., a subsidiary of Cox Enterprises, Inc. ("Cox"), and a petition to deny the assignment filed by Jacor.[2] As discussed below, based on our review of the applications, the pleadings and supplemental information, we grant the application for review and reverse the grant of the modification application, and dismiss the related application for license to cover. Further, we grant the petition to deny, and dismiss the assignment of license application.[3]

BACKGROUND

2. Cox, through its subsidiaries, is the licensee of WSB-TV, Channel 2 (ABC), WSB(AM), and WSB-FM, Atlanta, Georgia.[4] It is also the publisher of the *Atlanta Constitution* and the *Atlanta Journal*, the two dominant newspapers in Atlanta.[5] The transaction would comply with the Commission's revised radio ownership rules. Ownership of these media outlets in combination with Cox's proposed ownership of WJZF would result in violations of the one-to-a-market and broadcast-newspaper cross-ownership rules, 47 C.F.R. §§ 73.3555(c) and (d), because, as currently licensed, WJZF's 1 mV/m contour encompasses Atlanta.[6] Apparently recognizing these obstacles to the anticipated assignment of license transaction, on April 5, 1993, NewCity filed an application to modify the facilities of WJZF by changing from a non-directional antenna to a directional antenna, thereby slightly reducing WJZF's sig-

[1] On October 29, 1993, NewCity filed an opposition to the application for review, and, on November 8, 1993, Jacor filed a reply to the opposition.

[2] On August 24, 1993, NewCity and Cox filed a joint opposition to the petition to deny, and, on September, 3, 1993, Jacor filed a reply to the opposition. Also, on September 16, 1993, Jacor filed a request for *en banc* Commission consideration of the assignment application. We grant Jacor's request.

[3] On September 24, 1993, Telecommunications Research and Action Center and, on November 22, 1993, the Newspaper Guild filed informal objections to the assignment application raising substantially the same arguments as Jacor. Additionally, on November 24, 1993, Harold Martin filed a request asking that the Commission require Cox to withdraw the assignment application, vacate the sale, and allow a company controlled by an African-American to acquire the station. Mr. Martin contends that there are no African-American-owned FM or "significant" AM stations in the Atlanta market and argues that the needs of the African-American community in Atlanta are being ignored. In light of our actions herein, we will dismiss the three pleadings as moot. Finally, on March 22, 1994, Ms. Kari Dean filed an informal objection against Cox premised on the allegations contained in her employment discrimination complaint filed with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC is the proper forum in which to resolve the allegations in Ms. Dean's informal objection. *See Memorandum of Understanding Between the FCC and the EEOC*, 70 FCC 2d 2320, 2330 (1978); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5357-5358 (1993) (subsequent history omitted). Accordingly, Commission consideration of this matter is not warranted at this time and the informal objection will be dismissed.

[4] We note that Cox complies with the Commission's revised radio contour overlap rules, 47 C.F.R. § 73.3555(a), which permits a single entity to own up to two AM and two FM broadcast stations in a single market if there are 15 or more stations in that market and the proposed combination does not lead to "excessive concentration in the market." Excessive concentration will be presumed where the stations to be jointly owned have a combined audience share exceeding 25 percent. *In re Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *recon. granted in part and denied in part* ("*Radio Rules*"), 7 FCC Rcd 6387 (1992). There are 43 commercial radio stations within the Atlanta metro market and the combined audience share of WSB-AM-FM and WJZF is 12.9 percent.

[5] Cox's current ownership of a television-radio combination and a broadcast-newspaper combination in Atlanta are "grandfathered" under 47 C.F.R. §§ 73.3555(c) and (d).

[6] Section 73.3555(c) of the Commission's rules, the one-to-a-market rule, prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM

nal in the direction of Atlanta.[7] Since the city grade contour of WJZF, as modified, does not encompass the city of Atlanta, and the Grade A contour of WSB-TV does not reach La Grange, the transaction, when evaluated based on the modified facilities, would no longer violate the cited Commission's rules. The staff, however, approved the modification application based solely on its conclusion that the proposed changes complied with all technical rules. It expressly found that the multiple ownership questions posed by the assignment and the modification would be better resolved in the assignment proceeding. Subsequently, after reviewing the assignment application and pleadings, the staff sent Cox a letter noting the difficult issues presented by assignments that are permissible under the multiple ownership rules only because of facilities modifications and requesting that the applicants submit information addressing (1) whether a waiver of the one-to-a-market rule under the case-by-case standard would be justified, and (2) whether permanent waiver of the radio-newspaper cross-ownership rule would be justified pursuant to the guidelines recently provided by Congress in authorizing the Commission to amend its policies regarding waivers of that rule.[8] *See Letter from Chief, Mass Media Bureau, to Counsel,* dated November 23, 1993. On December 22, 1993, Cox submitted a responsive showing ("Cox Supp.").[9]

3. Thus, the questions before the Commission are (i) whether to grant the assignment application based on the earlier-filed modification application, (ii) whether to grant the assignment application based on Cox's waiver showing, or (iii) whether to dismiss the assignment application on the grounds that the grant of the modification application cannot be sustained and that the waiver showing is inadequate. As noted *supra*, we have concluded that the grant of the modification must be reversed and the assignment application must be dismissed.

DISCUSSION

4. *The Modification Application.* In the letter granting the modification application, the Bureau stated that, absent violations of the technical rules, modifications to radio broadcasting facilities are generally left to the licensee's discretion, as influenced by marketplace forces. In support the Bureau cited *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy,* 93 FCC 2d 436, 451-453 (1983), *recon. denied,* 56 RR 2d 835 (1984). However, that precedent does not address the Commission's traditional "concern about proposed modifications designed solely to avoid overlap problems [in violation of the multiple ownership rules]...." *Huron Shores Broadcasting Corp.,* 53 FCC 2d 216, 217 (1975) (*citing Jones T. Sudbury,* 4 RR 2d 679, 680 (1965)). This concern is heightened when the modification would result in less than maximum use of the facilities or where population presently served would lose service if a modification of facilities were to be granted. *Id.* In such circumstances, the public interest is generally better served by a dismissal of the modification application. Though NewCity cites *Coronado Communications Company,* 8 FCC Rcd 159 (MM Bur. 1992), for the proposition that "the Commission will permit licensees to take extraordinary actions involving loss of service in order to comply with its ownership prohibitions," Opp. to App. for Review at 10, that case is inapposite. In the cited case, applications to modify the facilities of KKTO-TV (Channel 2), Santa Fe, New Mexico, and for an assignment of license of that station were grant-

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station. Section 73.3555(d) of the Commission's rules, the broadcast-newspaper cross-ownership rule, prohibits the common ownership of a radio or television station and a newspaper if the 2 mV/m contour of an AM station, the 1 mV/m contour of an FM station or the Grade A contour of a television station encompasses the entire community in which the newspaper is published.

[7] On May 21, 1993, Jacor filed an informal objection to the modification application. Jacor in its objection alleged that (i) NewCity's modification application proposed a reduction in service area without providing a public interest benefit and (ii) the reduction in service of WJZF was an attempt to facilitate the sale of WJZF to Cox and avoid potential violations of the one-to-a-market and broadcast-newspaper cross-ownership rules. In a letter dated August 11, 1993, the staff dismissed Jacor's objection and granted the modification application. *See Letter from Chief, Audio Services Division, to Counsel,* Ref. 1800B3-LLS, dated August 11, 1993. A request for program test authority for the modified WJZF facilities and an application for license to cover the modified facilities were filed on December 23, 1993, but have not been granted. Thus, WJZF is currently serving all of Atlanta with its licensed facilities.

[8] The Commission has stated that the broadcast-newspaper cross-ownership rule will be waived only in cases where application of the rule would be "unduly" harsh. *Multiple Ownership - Second Report and Order in Docket No. 18110,* 50 FCC 2d 1046, 1077, *on recon.,* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978), and in fact only one permanent waiver of the rule has been granted. *Fox Television Stations, Inc.,* 8 FCC Rcd 5341, 5347-48 (1993), *recon. denied,* 8 FCC Rcd 8744 (1993), *appeals pending sub nom . Metropolitan Council of NAACP Branches v. FCC,* No. 93-1471 (D.C. Cir. 1993), and *Caucus for Media Diversity v. FCC,* No. 94-1039 (D.C. Cir. 1994). Although the Commission has been prohibited from using appropriations to, *inter alia,* repeal or begin or continue a reexamination of the rule, that restriction has not barred consideration of waivers. Recently, Congress incorporated into the appropriations restriction a provision that the Commission could "amend policies with respect to waivers" of the broadcast-newspaper cross-ownership rule. 107 Stat. 1167 (1993). In this regard, the legislative history states "that it may now be appropriate to permit the [Commission] to establish a more liberal policy with respect to waivers permitting cross-ownership of newspapers and radio stations." H. Rept. 103-293, 103rd Cong., 1st Sess. (1993), p.2. The legislative history indicates an intent that any such "new policy allow such waivers to be granted only in the top 25 markets [with] at least 30 [remaining] independent broadcast voices" provided that the Commission makes "a separate affirmative determination that [the transaction] is otherwise in the public interest, based upon the applicants' showing that there are specified benefits to the service provided to the public sufficient to offset the reduction in diversity which would result from the waiver." *Id.* at pp.2-3. The legislative history also indicates an intent that the Commission examine on a case-by-case basis requests for waivers in other circumstances upon a showing of "unique public benefits." *Id.* at p.3.

[9] On January 18, 1994, Jacor submitted a response to the letter and, on January 27, 1994, Cox submitted a reply. On February 3, 1994, Jacor filed a "Motion for Leave to File" and a reply. To assure a complete record in this case, and for the reasons stated by Jacor in its motion, we will grant the motion and consider the Jacor reply.

ed. To assure compliance with the TV duopoly rule, 47 C.F.R. § 73.3555(a)(3), however, grant of the assignment application was conditioned on the assignee's surrender of its license for Channel 14 upon commencement of operations on Channel 2. Substantial public interest factors, which outweighed the loss of Channel 14 service, were served by this action. Such factors included: (i) restoration of service from Channel 2, which had been "dark" because of financial losses; (ii) the programming previously available on Channel 14 would become available on Channel 2, whose service area would encompass and exceed that of Channel 14; and (iii) a modified, more competitive Channel 2 offered the possibility of economic viability for the station, one of only two TV stations licensed to Santa Fe. 8 FCC Rcd at 162-163. In contrast, as discussed below, the instant case does not present any similar or other substantial public interest factors supporting gr ant of the modification and assignment-of-license applications.

5. In the instant case, it is clear that the sole purpose of the modification application is to circumvent the Commission's multiple ownership rules and to facilitate the sale of WJZF to Cox. This conclusion is supported by Cox's concession that "[g]rant of [the modification] application and construction of the facilities as proposed therein are a condition to closing the instant transaction [the assignment application]. Such modification assures that no waivers of the newspaper cross-ownership rule or the one-to-a-market rule are necessary inasmuch as the 1 mV/m signal of [WJZF] will not encompass the City of Atlanta." *See* Assignment Application, Exh. B at 6; *see also* NewCity and Cox Jt. Opp. to Pet. Deny, at 3-4 (Cox "recognizes that its proposed acquisition of [WJZF], without waiver of the one-to-a-market or newspaper cross-ownership rules, is contingent upon the . . . grant of the . . . Modification Application and the implementation of the [permit] issued pursuant to such grant. . . . [Conversely], implementation [of the modification] is contingent upon the grant of the. . . Assignment Application, and once FCC consent to the proposed assignment of license is obtained, then NewCity will commence construction."). Further, the modification results in less than maximum coverage by WJZF[10] and, according to information submitted by Jacor and undisputed by Cox, a loss of predicted reception of WJZF by approximately 80,000 persons. *See* Jacor Pet. Deny, at 4, and Att. 1 at 2. Thus, *Huron Shores* and *Jones T. Sudbury*, *supra*, are clearly controlling.

6. We reject Cox and NewCity's argument that because those cases involved proposed acquisitions in small communities rather than in a large metropolitan area such as Atlanta they are not relevant. There is nothing in the two cases that limits the broad language proscribing modifications requested for the sole purpose of avoiding the multiple ownership rules to the circumstances of those cases. We also reject the argument that because the cases predated the Commission's recent relaxations of the multiple ownership rules, they are not relevant. We have taken measured steps to relax -- but have not eliminated -- those rules. *See Second Report and Order* in MM Docket 87-7 (*"Second Report and Order"*), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part* (*"Second Report and Order Recon."*), 4 FCC Rcd 6489 (1989). Nor have we overruled or modified the cited cases concerning application of the rules. Indeed they continue to reflect sound public policy. To hold otherwise would not only lead to increased concentration of local broadcast stations, but also would greatly encourage circumvention of the multiple ownership rules by use of facilities modifications that reduce service to presently-served populations and decrease efficient use of the spectrum by encouraging licensees to operate with less-than-maximum facilities. Thus, under the circumstances presented here, the grant of the modification cannot be sustained. Accordingly, the Cox and NewCity assignment application may be granted only if sufficient public interest factors are present to warrant waiving the one-to-a-market and broadcast-newspaper cross-ownership rules.

7. *Request for Waiver of the One-to-a-Market Rule.* The Commission's standards for waiver of the one-to-a-market rule are enunciated in the *Second Report and Order*, 4 FCC Rcd 1741 (1989) and the *Second Report and Order Recon.*, 4 FCC Rcd 6489 (1989). Under these standards, the Commission will presume that waiver of the rule will serve the public interest in cases involving (i) stations serving the top 25 markets where at least 30 separately owned, operated, and controlled stations will remain following the proposed combination; or (ii) "failed" stations (stations that have not been operational for a substantial period of time or are involved in bankruptcy proceedings). Otherwise, the applicants must persuasively demonstrate on a case-by-case basis that the public interest will be served by waiver of the rule. Atlanta is the 12th largest radio market and the 10th largest television market in the nation and is served by in excess of 40 independent stations. Thus, Atlanta would ordinarily be considered within the "top 25 markets/30 voices" standard for purposes of assessing whether to waive the one-to-a-market rule to permit common ownership of a television station and a single radio station in the same market. However, because Cox already owns a television station and an FM station in Atlanta, grant of its waiver request would create a second television-radio combination; also, since WJZF is not a "failed" station, Cox's request must therefore be evaluated under the case-by-case standard. *Review of the Commission's Regulation Governing Television Broadcast (NPRM)*, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992); *Radio Rules*, 7 FCC Rcd at 6394 n.40.

8. Under the case-by-case standard, enunciated in the *Second Report and Order*, the Commission makes a public interest determination based upon the following criteria: (i) the potential public service benefits of joint operation of the facilities; (ii) the types of facilities involved; (iii) the number of media outlets owned by the applicant in the relevant market; (iv) the financial difficulties of the station involved; and (v) the nature of the relevant market in light of the level of competition and diversity after joint operation is implemented. 4 FCC Rcd at 1753. In evaluating a request for a waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the

[10] Under the modification, WJZF would continue to operate at maximum height and power but will no longer be omnidirectional.

maintenance of diversity and vigorous competition within the market areas involved." *Second Report and Order Recon.*, 4 FCC Rcd at 6491.

9. In its response to the Bureau's letter of August 11, 1993, Cox addresses each of the prongs of the waiver standard. Regarding the first of the five case-by-case criteria, the potential public service benefits of joint operation, Cox notes that its Atlanta media holdings are operated on an independent and autonomous basis, and therefore co-ownership of WJZF will not result in the full panoply of traditional cost savings and economies of scale. However, Cox contends that co-ownership will enable consolidation of the administrative and sales functions of WJZF with Cox's other stations. For instance, Cox anticipates that, to the extent WJZF is relocated to the WSB-AM-FM-TV building, it will share mutual building services such as switchboard, receptionist, purchasing, security, mail room and janitorial services. The resulting efficiencies of operations will, according to Cox, facilitate public service benefits. In this regard, Cox states that it intends to begin a new, independent entertainment and public service format on WJZF, increasing the total hours of public service programming from three to five (two hours of which will involve locally-produced programming responsive to the needs and interests of La Grange and the region). Cox stresses that WJZF, under its previous WYAI call sign, simulcasted the programming of its "sister" station, WYAY(FM), Gainesville, Georgia, while Cox's proposed programming will not depend on simulcasting. According to Cox, the co-ownership of the stations will also allow WJZF access to Cox's existing newsgathering resources and meteorological capabilities to augment WJZF's present news, traffic, weather and information services. Finally, Cox notes that it also intends to implement a minority training program and a minority internship program in which the trainees and interns will be exposed to all aspects of operating a radio station.

10. Concerning the second and third criteria, the information submitted by Cox confirms that Cox is currently the licensee of three powerful broadcast facilities licensed to Atlanta: a network-affiliated VHF television station, a full-time, clear channel Class A AM station, and a Class C FM station.[11] It also owns the two most widely circulated daily Atlanta newspapers, the *Atlanta Constitution* and the *Atlanta Journal*. However, Cox stresses that all of its existing area stations are actually licensed to Atlanta, while WJZF, a Class C1 FM station, is licensed to La Grange, which is over 60 miles from Atlanta.[12] Further, Cox contends that the proposed combination will result in it only owning one AM, one FM and one TV which fully cover the Atlanta market and a second FM (WJZF) which, according to Cox, serves only 60 percent of the Atlanta market.

11. Regarding the fourth criterion, Cox advises that "[n]o showing is submitted with respect to the stations' financial conditions or sale attempts," thereby effectively conceding that there are no financial difficulties which would create a need to combine station operations. In other words, there is no showing that the continued viability of WJZF or any of the stations involved depends on approval and consummation of the proposed transaction. Nonetheless, Cox emphasizes that the Commission has held that this factor, *i.e.*, presence of financial difficulties, is not critical, *citing Second Report and Order Recon.*, 4 FCC Rcd at 6491 (not all five factors necessarily "will be relevant in every case").

12. The final factor is the nature of the relevant market in light of the Commission's concerns about diversity and competition. Factors considered in evaluating the number of broadcast outlets in the market are the number of separately owned and operated "voices", and the degree of cable and other non-broadcast media penetration. As to the market definition within which to count the number of broadcast stations, in the context of a one-to-a-market waiver, we consider "the relevant TV metro markets for radio stations and the relevant ADI [Arbitron Area of Dominant Influence] TV market for TV stations." *Second Report and Order*, 4 FCC Rcd at 1760 n.101. Cox states that Atlanta is the 12th largest radio market and the 10th largest television market in the nation.[13] According to Cox, the Atlanta metro market contains 43 commercial AM and FM stations, 7 commercial television stations, 1 non-commercial television station, 8 low power television stations, 33 cable television systems, 5 independent daily newspapers, 34 weekly newspapers, and numerous magazines with significant circulation.[14] Cox also points out that, as of July 1992, cable penetration in the Atlanta market was 60 percent.[15] Cox asserts that following the proposed acquisition, there will be 57 independent radio and television "voices" in the Atlanta metro market that are not affiliated with Cox.[16] Cox further states that within the Atlanta ADI, there are 11 television stations, 127 radio stations, 12 low power television stations, 68 cable television systems, 11 daily newspapers, 70 weekly newspapers, and 6 MDS/MMDS systems that are not affiliated with Cox. Cox concludes that the relevant "market is characterized by a remarkably high degree of diversity, a consideration which must control the decision here" and result in waiver of the one-to-a-market rule.[17]

13. We disagree. The pertinent case-by-case standard for evaluating whether to waive the rule is a five-part test. *See* paras. 7-8, *supra*. While not all five factors are relevant in every case, the overall showing must favorably demonstrate that a waiver is warranted. *Second Report and Order*, 4 FCC Rcd at 1753. Cox has failed to make the requisite showing.

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[11] WSB(AM) is a full-time, clear channel, 50 kilowatt (kW) Class A facility. WSB-FM is a Class C station operating at 100 kW effective radiated power (ERP) from an antenna 311 meters height above average terrain (HAAT). WSB-TV is an ABC-affiliated VHF station operating on Channel 2 at 100 kW ERP visual and 20 kW ERP aural from an antenna 1037 feet HAAT.

[12] WJZF is a Class C1 facility operating at 60 kW ERP from 371 meters HAAT.

[13] Cox Supp. at 2.

[14] Cox Supp. at 3. We note that the figures supplied by Cox regarding the number of commercial AM and FM stations in the Atlanta market varies in its submissions from 43 stations to 47 stations. In any event, our independent analysis indicates that there are in excess of 40 commercial AM and FM stations in the Atlanta market.

[15] *Id.*

[16] Cox Supp. at 10. The figures supplied by Cox regarding the number of remaining independent radio and television "voices" in the Atlanta market varies in its submissions from 55 remaining independent "voices" to 57 remaining independent "voices".

[17] *Id.*

14. *Facilities and Media Outlets.* First, the types of facilities involved and the number of media outlets in the Atlanta market already owned by Cox do not support the requested waiver. *See Kargo Broadcasting, Inc.*, 5 FCC Rcd 3442, 3443 (1990). The Commission, in the *Second Report and Order*, stated that "applicants who already own a number of media outlets in the relevant market will face a higher hurdle than those . . . applicants with few outlets." *Second Report and Order*, 4 FCC Rcd at 1753. Cox owns the two most prominent daily newspapers in Atlanta, the *Atlanta Constitution* and the *Atlanta Journal*, and owns and operates WSB-TV, a network affiliated station and one of only three commercial VHF stations in the Atlanta market. Further, in regard to Cox's radio stations in Atlanta, WSB(AM) is a clear-channel Class A station operating at maximum power, and WSB-FM is a Class C FM station. Finally, WJZF, the station Cox wishes to acquire, is a Class C1 station operating at maximum power. Cox's existing facilities possess the most powerful signal strength possible in each of the broadcast media. Class C1 stations, such as WJZF, are the second most powerful type of FM facilities. In *Kargo*, where the Commission denied a one-to-a-market waiver for similarly powerful facilities, we held that such facilities were "not . . . comparable to those [for] which the Commission has been predisposed to grant waivers of the one-to-a-market rule -- that is, this is not a case involving a station of the type that often has difficulties surviving in a competitive market, *e.g.*, UHF TV, small AM or Class A FM stations. In terms of power and competitive position, the stations involved in the instant proposal are exactly the opposite type." 5 FCC Rcd at 3443. In this case, the broadcast facilities involved are comparable to those in *Kargo*, but the newspaper interests owned by Cox hold substantially stronger market positions than did the interest owned by the unsuccessful proposed assignee in *Kargo*.[18] Although Cox argues that *Kargo* is inapposite because the application in *Kargo* did not involve a top 25 market such as Atlanta and because diversity in Atlanta is substantially greater than in Salt Lake City, we find the case useful precedent. As noted, Atlanta cannot be treated as a top 25 market under the circumstances presented here. *See* para. 7, *supra*. Further, in *Kargo*, as well as here, there would remain in excess of 30 independent broadcast voices after the proposed transactions.

15. *Finances.* Concerning the financial status of the station to be acquired and other attempts to sell the station, Cox and NewCity, as noted *supra*, declined to submit a showing, pointing out instead that the Commission has held that "not all of the [five] factors mentioned will be relevant in every case." *Second Report and Order Recon.*, 4 FCC Rcd at 6491. While Cox and NewCity are correct in this regard, we note that, even where the station to be acquired is in some financial distress -- which is not the case here -- we have determined that a waiver is not appropriate absent a strong showing under the other four factors. *See Kargo*, 5 FCC Rcd at 3443 & n.13 (circumstances did not warrant a waiver even though financial exhibits showed the station to be acquired suffered a loss of $100,000 over a four-year period and its "sister" station suffered a loss of $500,000 in the same period). In the instant case, where the financial situation does not weigh in favor of a waiver grant, Cox faces a heavy burden vis-a-vis the other factors.

16. *The Market.* As to the nature of the market and the question of the impact on continued diversity of the proposed joint operation, Cox argues that the acquisition will not reduce media diversity in Atlanta because Cox maintains rigid separation between its television and radio operational, editorial, and sales functions, because its broadcast and newspaper operations are managed independently of each other, and because its commonly-owned media are frequently extremely critical of each other. Cox Supp. at 8-9. Indeed, Cox argues that the proposed transaction may actually increase diversity since at the time of filing of the assignment application, WJZF was simulcast pursuant to a time brokerage agreement with its former "sister" station, WYAY, while after the acquisition Cox will institute a new, independent entertainment and public service format for WJZF. Cox, in essence, contests the need for structural diversity as a measure of ensuring voice diversity, maintaining instead that separate management and operation by a common owner will serve as well. As discussed below, we are not persuaded.

17. Regarding the impact on competition of the proposed transaction, both Jacor and Cox have submitted economic analyses to the Commission. Jacor's economic analysis, prepared by Alan Pearce, Ph.D., and J. Richard Carlson, MBA, of Information Age Economics ("IAE"), concludes that Cox currently controls over 50 percent of mass media advertising revenues in the Atlanta market while its closest competitor has a market share of only 7.16 percent. The IAE analysis notes that the degree of competitiveness in a market is determined by the number of competitors as well as the market power of these competitors and that the Herfindahl-Hirschman Index ("HHI") is used to measure the degree of concentration in a given market. According to the IAE analysis, the Atlanta market has a HHI of 2667, which is above the 1800 HHI threshold for "highly concentrated" markets under the Department of Justice/Federal Trade Commission merger guidelines. The IAE analysis asserts that Cox's 50 percent market share is the primary reason for such a high concentration and that allowing Cox to acquire an additional media outlet would only exacerbate the potential for anti-competitive activity and predatory pricing.

18. Cox contends that the proposed transaction will not result in a concentration of control that would exceed the guidelines established by the Department of Justice and Federal Trade Commission, supporting its assertion with a report prepared by Joseph W. McAnneny of Economists Incorporated ("EI"). The EI report argues that the IAE analysis fails to adequately explain why it excludes cable television systems and non-newspaper print media in its definition of the Atlanta media market while including such advertising media as direct mail. The EI report further asserts that the IAE analysis misapplies the HHI. According to the EI report, the HHI is a two-part test and the IAE analysis failed to include the second part of the test. Specifically, the EI report states that the HHI test first looks at the level of concentration in a market, then analyzes the change in a market's concentration due to the

[18] The *Kargo* assignee, which proposed to acquire a Class C FM, owned a network-affiliated VHF TV station, a noncommercial VHF TV station, a clear channel Class I-A (now Class A) AM station, a maximum-facility Class C FM station, all licensed to Salt Lake City, and the second largest newspaper in Salt Lake City. 5 FCC Rcd at 3443.

proposed merger (the delta HHI). It is this second part of the HHI test that Cox argues illustrates the *de minimis* impact of its acquisition of WJZF and demonstrates that no adverse effect on competition will occur if the proposed transaction is approved.

19. In a February 3, 1994 Reply, Jacor submits the statement of Alan Pearce, Ph.D. Dr. Pearce concludes that the IAE definition of the Atlanta media market is the correct definition[19] but that, even using the EI report's definition, Cox's HHI would only be marginally diluted and Cox would still have the dominant market share in the Atlanta market. Dr. Pearce also contends that the delta HHI is irrelevant here because Cox already possesses a highly concentrated portion of the market regardless of how the HHI is applied. Dr. Pearce concludes that "Cox already has too much market power in [a] highly concentrated market, and no further increase, no matter how quantified, is appropriate."

20. Clearly there is substantial disagreement as to the existing level of economic competition among the media in Atlanta and the advisability of permitting Cox to acquire WJZF given Cox's competitive position in the Atlanta market. At a minimum, it is clear that Cox now controls extremely powerful media interests in Atlanta and that, while it may not dominate the media there, it does possess significant competitive power. In any event, we note that, while the Commission's concern for promoting diversity and competition is complementary to, and includes consideration of, the anti-trust laws, it is not limited in scope to anti-trust issues. *See Multiple Ownership*, 50 FCC 2d 1046, 1078-1080, *recon. granted in part and denied in part*, 53 FCC 2d 589 (1975), *aff'd in relevant part sub nom. NCCB v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in relevant part, FCC v. NCCB*, 436 U.S. 775, 795-796 (1978). Rather, in deciding questions relevant to our goals, we must balance all relevant factors. *Second Report and Order*, 4 FCC Rcd at 1753. Thus, even assuming the truth of Cox's assertions concerning the anti-trust implications of the proposed transaction, the "no-harm" analysis they are intended to support is not enough in and of itself to support grant of a waiver. Cox must make an *overall* favorable showing that a waiver should be granted. *See* paras. 7 and 8, *supra*.

21. *Public Interest Benefits*. The remaining factor relevant to that determination here is, as noted, the public interest benefits of the proposed joint operation. Again, Cox's showing falls short. The Commission has, in the past, held that substantial cost savings and economic efficiencies are "precisely the type of public interest benefit from common station ownership which we envisioned as warranting a waiver of the one-to-a-market rule . . . ." *Great American Television and Radio Co., Inc.*, 4 FCC Rcd 6347, 6349 (1989), and we expect applicants to outline these potential benefits with specificity. *Second Report and Order*, 4 FCC Rcd at 1753. Here, Cox admits that traditional cost savings and economies of scale will not result because all of Cox's holdings in Atlanta are operated on an independent and autonomous basis. Cox Supp. at 7 ("common radio-television station ownership will not generate material cost efficiencies in radio-television operations"). There will be no combined management, sales and merchandising, programming production, or news production. Indeed, the only savings Cox names are general benefits such as sharing building and switchboard services, and Cox has not quantified those savings. It does indicate, however, that other public interest benefits will accrue because it intends to institute some enhancements to public service programming and to initiate minority internships and training programs.

22. We find that the benefits Cox suggests will accrue from the proposed joint operation are far from the positive public interest benefits showing required to rebut the presumption expressed in the existing rule that ownership diversity is preferred as a means of furthering our goals of promoting viewpoint diversity and competition. We recognize that "with any combination of two or more stations, . . . some efficiencies result." *Kargo*, 5 FCC Rcd at 3443. Here, as in *Kargo*, the applicants have failed to point to any public benefits so substantial as to rise above the "administrative" benefits and efficiencies of any combination of commonly owned stations serving the same market. *Id.* While we favor under any circumstances such actions as the internships and training programs Cox describes, they are not, even when considered in conjunction with the minor cost benefits suggested by Cox, sufficient to warrant waiver of the rule.

23. Based upon the foregoing, we conclude that a waiver of the one-to-a-market rule is not justified and that the application to assign the license of WJZF to a Cox subsidiary must be dismissed on that ground. *See Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"). Having reached that conclusion, we need not reach the issue of the broadcast-newspaper cross-ownership prohibition or the argument raised by Jacor that, even in light of the recently passed legislation concerning the Commission's authority to grant waivers of the prohibition under certain limited circumstances, *see* note 8 *supra*, the Commission must undertake a rule making proceeding "to develop and institute [the] policy" addressed by the legislation. Jacor Response at 21.

CONCLUSION AND ORDER

24. In view of the foregoing, we conclude that the Mass Media Bureau's August 11, 1993 grant of NewCity's application to modify the facilities of WJZF cannot be sustained. We also conclude that a waiver of the Commission's one-to-a-market rule is not warranted as Cox has failed to demonstrate that such waiver would serve the public interest.

25. ACCORDINGLY, IT IS ORDERED, That the request for *En Banc* consideration filed on September 16, 1993, the motion for leave to file which was filed on February 3, 1994, the application for review filed on October 13, 1993, and the petition to deny filed on August 9, 1993, by Jacor Broadcasting of Atlanta, Inc. ARE HERE-

[19] Dr. Pearce states that the IAE analysis correctly excluded cable television systems from its definition of the Atlanta media market because cable television does not rely on advertising for its revenues, while radio, newspapers and television rely heavily on advertising to make them economically viable. The proper definition of the Atlanta media market, as defined in Dr. Pearce's statement, is "major mass appeal and mass circulation newspapers covering the entire metropolitan area, and radio and TV outlets."

BY GRANTED to the extent noted above, That the informal objections filed on September 24, 1993 by Telecommunications Research and Action Center, on November 22, 1993 by the Newspaper Guild, on November 24, 1993 by Harold Martin, and on March 22, 1994 by Kari Dean ARE HEREBY DISMISSED, That the Bureau's grant of the application to modify the facilities of WJZF(FM), La Grange, Georgia (BPH-930405IC) IS HEREBY VACATED and that application IS HEREBY DENIED, and That the applications for license to cover (BLH-931223KA) and for Commission consent to the assignment of license of WJZF(FM) from NewCity Communications of Massachusetts, Inc. to WSB, Inc. (BALH-930625GG) ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Concurring Statement of Commissioner James H. Quello

RE: Modification of Construction Permit and Assignment of License (La Grange, Georgia)

As the broadcast industry faces ever-increasing competition from multichannel video providers, this Commission must remain vigilant in ensuring that over-the-air broadcast remain viable as a mass medium in this country. Consistent with this goal, we are currently considering relaxing our multiple ownership rules. Review of the Commission's Regulations Governing Television Broadcasting; 1995 WL 40376, MM Docket No. 91-221 (1995). In the meantime, we are saddled with ownership policies that are more restrictive than may be necessary given the realities of an evolving marketplace. Because I believe our multiple ownership rules are outdated, I reluctantly concur in the denial of Cox's waiver request. At the same time, I recognize that any change in our ownership policies should be accomplished through our pending rulemaking and not through our waiver process.

Cox is already the licensee, under a grandfathered combination, of an AM, FM and TV station in Atlanta, Georgia, and is the publisher of the two dominant newspapers in Atlanta. According to the majority in this case, the assignment of another Atlanta FM station to Cox would result in an unacceptable level of concentration in the market. I fail to see how the addition of one FM station would result in an appreciable increase in that concentration. I am also somewhat baffled as to why Cox's purchase of an additional FM station should be denied in light of the vast array of other radio, television, cable, MMDS, and DBS facilities (not to mention the imminent arrival of satellite DARS and video dialtone) available in Atlanta, the twelfth largest radio market in the nation.

Sadly, while Cox's future vision is clearly progressive and innovative, it is still beyond the current realities of our federal bureaucracy. I look forward to the day this Agency takes a more common-sense view of our multiple ownership rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

WNNE-TV, Inc. CSR-4003-A
Hartford, Vermont

For Modification of Station
WNNE-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1995; Released: May 8, 1995

By the Cable Services Bureau:

INTRODUCTION

1. WNNE-TV, Inc. ("WNNE-TV"), licensee of commercial Television Broadcast Station WNNE-TV (NBC, Channel 31), Hartford, Vermont, has filed the captioned petition for special relief seeking to include communities of Ashland, Bath, Bath (village), Bethlehem, Bethlehem (town), Campton, Canaan, Dorchester, Enfield, Franconia, Groton, Hanover, Haverhill, Holderness, Lebanon, Lincoln, Lisbon, Littleton, Monroe, North Haverhill, Piermont, Plymouth, Rumney, Sugar Hill, Thornton, Warren, Waterville Valley, Wentworth, Woodstock, Woodsville and surrounding areas of Grafton County (collectively known as "the Communities") within the Burlington, Vermont-Plattsburgh, New York "area of dominant influence" (ADI) for the limited purpose of cable television mandatory broadcast signal carriage rules.[1] State Cable TV Corporation ("State Cable"), a cable operator serving six communities in Grafton County, filed an opposition to the petition for special relief. WNNE-TV filed a reply to State Cable's Opposition.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate thepurposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as:
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> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
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> (II) whether the television station provides coverage or other local service to such community;
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> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
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> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market con-

[1] WNNE-TV's petition covers all communities in Grafton County, New Hampshire, except the communities of Alexandria, Bridgewater, Bristol and Hebron. These communities were the subject of an earlier filed petition that the Commission granted in *WNNE-TV, Inc.*, 9 FCC Rcd 270 (1994).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

sistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES*

8. WNNE-TV states that its request includes all communities served by cable systems in Grafton County, New Hampshire, exclusive of the communities of Alexandria, Bridgewater, Bristol and Hebron. Grafton County is located in the Portland-Poland Spring, Maine ADI and WNNE-TV's community of license, Hartford, Vermont, is located in Windsor County, which is assigned to the Burlington-Plattsburgh ADI. WNNE-TV states that because the county is rural and mountainous many viewers in the Communities rely on cable television to receive local broadcast signals.

9. One quarter of Grafton County immediately adjoins Windsor County, in which WNNE-TV's city of license is located, at the New Hampshire-Vermont border. Hartford, Vermont, WNNE-TV's community of license, is one mile away from Lebanon, New Hampshire, Grafton County's largest community. Four miles due north from Hartford is Hanover, New Hampshire, Grafton County's second largest community. In terms of land area, Grafton County is the largest county in New Hampshire, extending north of Windsor County approximately 60 miles.[11]

10. In support of its petition, WNNE-TV notes that it has been carried historically on most of the principal cable systems in Grafton County.[12] WNNE-TV maintains that

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id. and* n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.
[11] Rand McNally, Commercial Atlas and Marketing Guide (125th ed. 1994) at 414, 196-7.
[12] WNNE-TV has been carried historically on Grassroots Cable's Rumney, Bath and Enfield systems; on Westmarc Development Joint Venture's Lebanon system; State Cable TV's Littleton and Plymouth systems; G.O. Enterprises' Piermont system; and Vermont Cablevision Associates' Woodsville system. WNNE-TV has been carried on State Cable TV's Lincoln system only since 1991 and WNNE-TV is currently carried on SkiSat's Waterville Valley system, but does not present any evidence of historic carriage. WNNE-TV is not carried and has not been carried on the following systems: Sirius Systems and Commonwealth Cable Systems both serving Campton, Holderness and Thornton; Grassroots Cable Systems serving Sugar Hill; Grassroots Cable Systems serving Monroe; and Pegasus Cable TV serving Bethlehem, Bethlehem (town) and Franconia.

carriage is due to the fact that it considers the Communities an integral part of its principle service area and is considered a local station by local businesses. WNNE-TV states that in 1992 fifty different businesses in Grafton County advertised on WNNE-TV. WNNE-TV argues that this demonstrates the importance of WNNE-TV as an advertising medium for local business that cannot afford the higher rates of Boston or Portland, Maine stations and who need WNNE-TV to reach their large market area. WNNE-TV's close identification with the area is evidenced by its standard on air identification as "Hartford-Hanover." WNNE-TV states that it places a predicted Grade A contour over Lebanon and a third of Grafton County and places a predicted Grade B contour over three-fourths of the county.

11. WNNE-TV asserts that it is significantly viewed by persons in Grafton County.[13] Significantly, WNNE-TV states, Arbitron has reclassified Grafton into the Burlington-Plattsburgh ADI for 1992-93, and the February 1993 A.C. Nielsen station index has assigned Grafton to the Burlington-Plattsburgh ADI. WNNE-TV argues that during much of last two decades Grafton was in Burlington-Plattsburgh ADI.[14] WNNE-TV argues that the grant of its petition is warranted because viewers would lose the signal based solely on the fact that the Commission chose 1991-92 data rather than an earlier or later year when Grafton County was assigned to the WNNE-TV's ADI.

12. Moreover, WNNE-TV cites numerous news stories it broadcast relating to issues of interest to the Communities and Public Service Announcements (PSAs) for community groups and activities in Hanover, Enfield, Plymouth, Lyme. In addition, WNNE-TV serves the community through activities such as co-sponsoring charitable events, organizing school tours of its facilities, and providing speakers for career day at area schools.

13. In addressing the third statutory factor, WNNE-TV states that the stations assigned to the Portland-Poland Spring ADI [Stations WMTW-TV (ABC, Channel 8), Poland Spring, Maine; WCSH-TV (NBC, Channel 6), Portland, Maine; WGME-TV (CBS, Channel 13), Portland, Maine; and WPXT-TV (Ind., Channel 51), Portland, Maine] are licensed to Portland or Poland Spring, Maine which are 96 miles from Grafton County's largest community. WNNE-TV states that WMTW-TV is the only station that provides coverage equal to or better than WNNE-TV. WCSH-TV and WGME-TV place a Grade A contour to 10% of the county and a Grade B contour to 50% of the county; WPXT-TV provides no predicted Grade B to any portion of the county. Because the Portland-Poland Spring market is much larger -- the population of Portland alone is equal to the entire population of Grafton County -- WNNE-TV maintains that the stations do not address the local news needs of the county but focus their programming on the Portland area.

14. In opposition, State Cable asserts that WNNE-TV does not provide sufficient signal coverage to the entire county because it does not place a Grade B over the town of Littleton, where most of the subscribers to State Cable's Lisbon-Littleton system live. State Cable asserts that market modification for Grafton County will exacerbate subscriber confusion over the 1992 Cable Act's must-carry requirements, because subscribers closely identify with the Boston market and were upset over losing the Boston stations. State Cable states that it serves only seven of the thirty eight cable communities in Grafton County and, therefore, WNNE-TV cannot rely on county-wide data to determine viewing patterns in the communities State Cable serves.

15. WNNE-TV replies that its Grade B coverage is not dispositive of whether WNNE-TV provides local service, but other factors additionally support treating WNNE-TV as local. WNNE-TV states that the Grade B signal gaps in Grafton County are insignificant, and that its Grade B contour does cover the town of Lisbon, which is linked to State Cable's Littleton system. WNNE-TV emphasizes that the local programming it provides the Communities' residents, the station's proximity to the county, the treatment by local advertisers, and the fact that it is licensed to operate television translator station W65AM in White River Junction, Vermont on the Grafton-Windsor border are factors supporting WNNE-TV's claim of localism. WNNE-TV argues that State Cable's claim that WNNE-TV's viewership data is inadequate because it does not provide community information is without merit. Because the petition effectively seeks to add all communities in Grafton County, WNNE-TV asserts that county-wide data is desirable.

ANALYSIS AND DECISION

16. We shall grant WNNE-TV's petition in part and deny it in part. We note that WNNE-TV has demonstrated, based on county-wide rather than community-specific evidence, that it achieves substantial viewership in Grafton County,[15] and that many local businesses in the county use WNNE-TV as an advertising medium. We have previously stated that absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type. However, we note that Grafton County covers a large land area, and that while it is contiguous to WNNE-TV's home county in certain areas, other areas of the county are more than fifty miles from WNNE-TV's translator station in White River Junction, Vermont, making evaluation of the petition for specific communities difficult based solely on county-wide data. The frequent shifts in Grafton County's ADI designation between the Portland-Poland Spring ADI and the Burlington-Plattsburgh ADI further reflect the difficulty in categorizing this county based on aggregated numbers. Thus,

[13] For a network station to be deemed significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and net weekly circulation of at least 25 percent. 47 C.F.R. §76.5(i). Citing 1992 Nielsen Station Index, *County by County Report*, WNNE-TV states its viewing in Grafton County was: "Total viewing - 789 households, 10% share; Non-cable households - 163 households, 11% share; Average weekly cume - 51%; Cable households (by extrapolation) - 626 households, representing 79% of WNNE-TV's viewing in Grafton County." Petition at 9.

[14] Grafton was assigned to the Burlington-Plattsburgh ADI in 1989-90, 1988-89, 1986-1987; 1983-1984; 1978-79; 1976-77. A.C. Nielsen has assigned Grafton County to Burlington-Plattsburgh continuously since 1986. Petition at 10.

[15] The Nielsen data presented by WNNE-TV is confirmed by Arbitron data, in which WNNE-TV has an 8 share and 40 percent net weekly circulation in Grafton County. Only one Portland-Poland Spring station, WMTW-TV, achieves a greater viewership with a 14 share and 44 percent net weekly circulation in the county. Arbitron, *Television County Coverage: New Hampshire* (Standard/Fringe), 1993.

although WNNE-TV has satisfied the fourth statutory factor using county-wide evidence on viewership and local advertising patterns, we shall look at the other factors to determine whether market modification is appropriate for the specific communities.

17. With respect to historic carriage, WNNE-TV has not demonstrated a history of carriage on all cable systems serving the Communities. WNNE-TV is not and has not been carried on five cable systems serving the communities of Campton, Thornton, Sugar Hill, Monroe, Bethlehem, town of Bethlehem, and Franconia. In addition, WNNE-TV fails to provide any historic carriage information for the cable system serving Waterville Valley. With respect to all other cable systems in the Grafton County communities, WNNE-TV has demonstrated historic carriage.[16]

18. WNNE-TV's showing on the second factor varies significantly throughout the county. WNNE-TV places a City Grade over the southwest corner of the county including the county's two largest communities, places a Grade A contour over one-third of the county, and places a Grade B contour over three-fourths of the county. We have previously stated that the second statutory criterion may be satisfied with a showing that the station places at least a predicted Grade B contour over or is located close to the community in terms of mileage.[17] State Cable challenges WNNE-TV's petition by arguing that WNNE-TV does not place a Grade B contour over the community of Littleton or the entire county. We find, therefore, that WNNE-TV has satisfied the second criterion with respect to those of the Communities that are located within WNNE-TV's Grade B contour.[18] While WNNE-TV demonstrates in its petition that it provides programming and other activities concerning the Grafton County communities, these newscasts and activities concentrate on communities in the southwest corner of the county, primarily within WNNE-TV's Grade A contour. Thus, we find that WNNE-TV has not demonstrated coverage or local service to the Grafton County communities that fall outside its Grade B contour.[19] With respect to all Grafton communities within its Grade B contour, excepting Campton, Monroe, Sugar Hill, and Thornton, WNNE-TV satisfies the first, second and fourth criteria for market modification in the 1992 Cable Act.

19. With respect to the third criterion, WNNE-TV alleges that other stations in Portland-Poland Spring ADI do not provide coverage and programming to the county. State Cable argues that residents prefer to receive Boston stations and identify closely with Boston. However, our inquiry is limited to stations entitled to mandatory carriage on the Grafton systems, and the Boston stations are not in the same ADI as Grafton County. Therefore, the subscribers' preference for Boston stations is irrelevant to our inquiry. We note that several stations from Portland provide service to all or parts of Grafton County. We believe that Congress did not intend the third criterion to be a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, it appears that other stations do serve Grafton County, this enhancement factor would not appear applicable. Thus, even absent the enhancement under the third criterion, grant of WNNE-TV's request with respect to the communities listed in note 18, *supra*, excepting Campton, Monroe, Sugar Hill, and Thornton is warranted.

20. With respect to Bethlehem, Bethlehem (town), Franconia, and Waterville Valley, we find that WNNE-TV has only satisfied the fourth factor because these communities lie outside of WNNE-TV's Grade B and have no history of carriage of WNNE-TV. Similarly, WNNE-TV fails to met the first two factors for the communities of Sugar Hill and Monroe because these communities are on the outside edge of WNNE-TV's service area yet WNNE-TV's actual news coverage does not appear to extend to these communities and there is no history of carriage on the communities' cable systems. Although WNNE-TV fails to satisfy the first factor with respect to the communities of Campton and Thornton, we note that these communities lie within, but close to the outer edge of, WNNE-TV's Grade B service area. We find that WNNE-TV's showing on the second factor is not sufficient to outweigh the lack of historic carriage, given the fact that these communities lie near the outer edge of WNNE-TV's service area and the lack of actual programming directed to these communities. Therefore, we find that WNNE-TV's failure to satisfy the first two factors with respect to the communities of Bethlehem, Bethlehem (town), Campton, Franconia, Monroe, Sugar Hill, Thornton, and Waterville Valley outweighs WNNE-TV's showing on the fourth factor and does not merit a grant of WNNE-TV's request.

21. The factors as applied to the community of Littleton, however, present a different scenario. WNNE-TV has been carried on the Littleton-Lisbon system since 1982 and while Littleton falls outside of WNNE-TV's Grade B service contour, Lisbon is within the Grade B. We note that Littleton and Lisbon are farther west from Portland---and therefore closer to WNNE-TV's city of license---than the communities discussed in paragraph 20, *supra*. Moreover, unlike these other communities, Littleton is not within the service contours of many Portland stations. With respect to the community of Littleton, we believe that the long history of carriage and its proximity to WNNE-TV relative to Portland overcomes the lack of Grade B coverage. Therefore, WNNE-TV's showing for Littleton on the first and fourth factors, the evidence relating to the importance of WNNE-TV as an advertising medium for local business, and its integration with Littleton outweigh its failure on the second factor and warrants a grant of WNNE-TV's request.

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[16] While we note that State Cable's system serving the communities of Lincoln, North Woodstock, and Woodstock began to carry WNNE-TV only in 1991, we believe that this satisfies the factor of historic carriage. In addition, because WNNE-TV has demonstrated historic carriage on one of the three cable systems serving Holderness (State Cable TV), we find that this satisifies the first factor with respect to Holderness.

[17] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[18] These communities are Ashland, Bath, Bath (village), Campton, Canaan, Dorchester, Enfield, Groton, Hanover, Haverhill, Holderness, Lebanon, Lincoln, Lisbon, Monroe, North Haverhill, North Woodstock, Piermont, Plymouth, Rumney, Sugar Hill, Thornton, Warren, Wentworth, Woodstock and Woodsville.

[19] These communities are Bethlehem, Bethlehem (town), Franconia, Littleton and Waterville Valley.

22. Accordingly, for the purposes of determining mandatory signal carriage obligations, we shall consider the communities of Ashland, Bath, Bath (village), Canaan, Dorchester, Enfield, Groton, Hanover, Haverhill, Holderness, Lebanon, Lincoln, Lisbon, Littleton, North Haverhill, North Woodstock, Piermont, Plymouth, Rumney, Warren, Wentworth, Woodstock, Woodsville, and surrounding areas of Grafton County to be part of the Burlington, Vermont-Plattsburgh, New York ADI with respect to WNNE-TV, as well as within the Portland-Poland Spring, Maine ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

ORDER

23. In view of the foregoing, we find that grant of WNNE-TV's petition, to the extent indicated above, is in the public interest.

24. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed July 7, 1993 by WNNE-TV, Inc. IS GRANTED to the extent indicated in paragraph 22 above and in all other respects IS DENIED. This change shall be effective in accordance with the following schedule: WNNE-TV, Inc. shall notify the cable systems in question in writing of its carriage and channel position election (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of the above notice.

25. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Diversified Communications — CSR-3970-A
Gainesville, Florida

Petition for Special Relief
for Modification of Station
WCJB-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 8, 1995

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Diversified Communications ("WCJB-TV"), licensee of Station WCJB-TV (ABC, Channel 20), Gainesville, Florida, has filed the above-captioned petition for special relief requesting the Commission to modify its television market for purposes of establishing must-carry rights to include 26 communities in Marion County, Florida[1] within the Gainesville, Florida "area of dominant influence" ("ADI"). The petition is opposed by WFTV, Inc. ("WFTV"), licensee of Station WFTV (ABC, Channel 9), Orlando, Florida, and WCJB-TV has replied.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the country. For purposes of this calculation, both over-the-air-and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

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> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] These communities are: Orange Springs, McIntosh, Citra, Reddick, Sparr, Fort McCoy, Eureka, Salt Springs, Anthony, Silver Springs, Ocala, Lynn, Silver Springs Shores, Moss Bluff, Belleview, Oklawaha, Summerfield, Marion Oaks, Pine Run, Oak Run, Dunnellon, Orange Lake, Sharpsferry, Rainbow Park, Southgate, and Rainbow Springs.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory signal carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

* * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the stations could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

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MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue here are all located in Marion County, Florida, which is located within the Orlando-Daytona Beach-Melbourne ADI. The Gainesville ADI, in which WCJB-TV is located, consists of four counties, and the communities here in question are located immediately to the south of the ADI.

9. In support of its petition, WCJB-TV states that it has been historically carried on numerous Marion County cable systems. In addition, in order to show that it provides coverage and other local service to Marion County, WCJB-TV states that its Grade B contour encompasses a substantial portion of Marion County. Each of the communities that WCJB-TV requests to be included within the Gainesville ADI receives Grade B coverage from the station, with the exception of Salt Springs, which is just outside the Grade B contour. WCJB-TV also states that it provides coverage of local Marion County news and weather and goes as far as interrupting its programming to warn Marion County viewers of impending weather threats and instructs viewers as to the necessary precautions. Moreover, WCJB-TV states that its presence in Marion County extends beyond its daily news and other broadcasts because the station sponsors community events and station personnel are actively involved in the community.

10. Finally, WCJB-TV states that there is evidence of widespread viewership of the station in Marion County. In support, WCJB-TV submits a 1992 "Nielsen Special Geographic Study" which shows that during that year it had the highest rating and share of any local news program in Marion County in the 6:00 p.m. time slot. In addition, while not the leader in the 11:00 p.m. slot, the information submitted shows that WCJB-TV had the second highest rating and share of local Marion County news programs. Moreover, WCJB-TV notes that its news programs attract a far greater share of Marion County viewers than the news programs of WFTV. According to the information submitted, WCJB-TV's total share during the 6:00 p.m. news slot is 27, compared to an 18 share for WFTV. In the 11:00 p.m. slot, WCJB-TV's total share is 18, compared to a 10 share for WFTV. With regard to the average quarter hour

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[8] 8 FCC Rcd at 2977 (emphasis in original).
[9] *MM Docket 92-259*, 8 FCC Rcd at 2977 n.139.
[10] 47 C.F.R. §76.59.
[11] *MM Docket 92-259*, 8 FCC Rcd at 2981.

viewership in Marion County for WCJB-TV in cable and noncable households, the information submitted shows that the station has a 9 share among cable households and a 14 share among noncable households. This means that in cable households, WCJB-TV ranks fourth among the eight commercial stations in the Gainesville and Orlando markets. Among the noncable households in Marion County, WCJB-TV ranks second in the market. WCJB-TV also points out that it has the same total share of viewing households as WFTV.

11. In opposition, WFTV argues that WCJB-TV's petition is procedurally defective because it fails to demonstrate community-specific support for the requested market change, but instead relies on county-wide information to support its request. In the event that the petition fails on procedural grounds, WFTV argues that the petition fails sufficiently to demonstrate relief under the four statutory factors taken into account when evaluating ADI reassignment requests. Specifically, WFTV argues that WCJB-TV fails to show an historical record of cable carriage. In addition, WFTV argues that WCJB-TV's petition makes no showing of service to specific communities, but instead relies on brief overviews of activities and programming within Marion County. WFTV also argues that in addition to itself, other Orlando television stations report on events and issues of concern to Marion County but this factor is ignored by WCJB-TV.

12. WFTV also argues that there is no factual support for WCJB-TV's assertion that viewer ratings and share of audience information for the times during which news programming is aired indicates that the station provides the most significant local television service to Marion County. WFTV contends that WCJB-TV's argument in this regard is flawed because the station should not be comparing its individual rating and share for news to all the other stations in both the Gainesville and Orlando ADIs. According to WFTV, the more appropriate comparison is the share enjoyed by the total Gainesville ADI stations compared to that by the total Orlando ADI stations. When this comparison is made, according to WFTV, the news programming offered by the Orlando stations, as a group, is preferred to that offered by WCJB-TV, the sole Gainesville station broadcasting news programming during the subject time periods. Moreover, WFTV states that a comparison of the 1992 and 1993 Nielsen share of audience information for the two stations reveals that WCJB-TV's share for the 6 p.m. and 11 p.m. news has decreased while WFTV's share has increased. As a result, WFTV notes that WCJB-TV's 1993 share of the 6 p.m. news is now only greater than its own by one and it exceeds WCJB-TV's share by two in the 11:00 p.m. slot. In its reply, WCJB-TV generally responds by stating that it is not seeking reassignment of Marion County to its market, but is instead merely attempting to maintain existing cable carriage of WCJB-TV in the communities at issue. The station also responds that it has demonstrated that it provides local service to those communities and that it has significant viewership in Marion County which relies on the station for local service.

ANALYSIS AND DECISION

13. WCJB-TV has demonstrated in its petition that the Marion County communities in question are logically part of its ADI market under the factors specified in the 1992 Cable Act, and its petition will accordingly be granted.[12] WCJB-TV has shown Grade B coverage to a substantial portion of Marion County, including all of the communities that it requests to be included within the Gainesville ADI, with the exception of Salt Springs, which is just outside the station's Grade B contour. We have previously stated that this is sufficient to demonstrate coverage or other local service.[13] Moreover, this showing is augmented by evidence submitted by WCJB-TV that it provides coverage of local Marion County news and weather, and that its presence in the community extends beyond its various broadcasts because it sponsors community events and station personnel are actively involved in those events. While we recognize that Salt Springs is beyond WCJB-TV's predicted Grade B contour, we nevertheless believe, based upon the relatively high viewership shares obtained by the station, its long term carriage in the community, and Salt Springs' close proximity to WCJB-TV's predicted Grade B contour, that a grant of WCJB-TV's petition, including this community; is warranted. With regard to long term carriage, WCJB-TV has a history of carriage on the cable systems serving a majority of the communities at issue since 1990, and has demonstrated carriage on the systems serving all of the communities since 1993.[14]

14. WCJB-TV has not provided information as to lack of specific coverage of local events, sports, or news in these communities by other stations presently eligible to assert mandatory carriage rights on cable systems serving these communities. However, we do not believe that Congress intended this criterion to act as a bar to a station's ADI claim if it were to be shown that other stations serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue. Finally, WCJB-TV data from Nielsen demonstrate that the station has a substantial viewing audience in Marion County, and that it is competitive with its neighboring ABC affiliate in Orlando, WFTV, especially in the area of news programming. This is also reflected in recent data from Arbitron, which show that WCJB-TV has a 10 share of viewing hours and a net weekly circulation of 56 in cable homes in Marion County (compared with a 10 share and net weekly circulation of 68 for WFTV), and 16 share

[12] WFTV argues that WCJB-TV's petition is procedurally defective because it fails to demonstrate community-specific support for its requested market change. We disagree. We believe that WCJB-TV properly characterized its ADI modification request and was not requesting the reassignment of Marion County to WCJB-TV's television market, but instead was requesting the addition of 26 communities in that county to its market.

[13] *MM Docket 92-259*, 8 FCC Rcd at 2977. *See also* paragraph 5, *supra*.

[14] In order to substantiate its claim, WCJB-TV submitted an exhibit, supported by a sworn affidavit, attesting to the fact that it has been carried on the cable systems serving all of the communities at issue since May 1993. Moreover, review of available Commission resources indicates that cable systems in a majority of the communities involved here were carried on WCJB-TV since at least 1990.

and net weekly circulation of 52 in noncable homes in Marion County (compared with a 12 share and net weekly circulation of 52 for WFTV).[15]

15. In view of the foregoing, we find that grant of WCJB-TV's petition is in the public interest. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, channel capacity, and program duplication. *See* paragraph 7, *supra*.

ORDER

16. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules, 47 C.F.R. §76.59, that the captioned petition for special relief filed June 16, 1993 by Diversified Communications IS GRANTED.

17. IT IS FURTHER ORDERED, That this change shall be effective in accordance with the following schedule: WCJB-TV shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57 and 76.64(f) of the Commission's Rules) within 30 days of the release date of the *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

18. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[15] Arbitron, *Television County Coverage: Florida* (Cable-Controlled Counties), 1993. We do not agree with WFTV that when examining viewer data the more accurate comparison is between the total Gainesville market as compared to the total Orlando market. It is not a matter of whether Marion County should be in either of the two markets. Instead, we are determining whether or not the above-referenced communities in that county should be added to the market of a single station, WCJB-TV. For that purpose, we are only interested in the ratings of that station and not in a comparison of ratings between the Gainesville and Orlando markets.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

TELEVISION MARKETING GROUP OF JACKSON, INC.
Jackson, Tennessee

CSR-3921-A

For Modification of Television Broadcast Station WMTU's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 8, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Television Marketing Group of Jackson, Inc. ("WMTU"), licensee of commercial television station WMTU (Ind., Channel 16), Jackson, Tennessee, has filed the captioned petition seeking to include within the Jackson, Tennessee "area of dominant influence" (ADI) 13 communities located in Gibson County, Crockett County, Dyer County, Chester County, and McNairy County, Tennessee, and Pemiscot County, Missouri ("the Communities")[1] for purposes of the cable television mandatory broadcast signal carriage rules. WMTU's request is unopposed.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular

[1] The Tennessee communities that WMTU wants to include in its ADI are as follows: in Gibson County, Humboldt (which is served by Humboldt Cable TV), Milan (which is served by Volunteer Cablevision), Trenton (which is served by Trenton TV Cable), Dyer, and Bradford (which are both served by Enstar Cable); in Crockett County, Alamo (which is served by Cablevision Industries) and Gadsden (which is served by Deffner Cable); in Dyer County, Dyersburg (which is served by Cablecom of Dyersburg) and Newbern (which is served by Cablevision Industries); in Chester County, Henderson (which is served by Volunteer Cablevision); and in McNairy County, Selmer (which is served by Cablevision Industries). The Missouri communities are as follows: in Pemiscot County, Steele (which is served by Triax Communications) and Caruthersville (which is served by Bootheel Video).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-77 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND PETITIONER'S ARGUMENTS

8. WMTU (former call sign WJWT) is licensed to Jackson, Tennessee, which is located in Madison County, Tennessee, in the western portion of the Jackson, Tennessee ADI. Gibson, Crockett, Chester, and McNairy Counties abut the northwestern or southwestern boundaries of Madison County and are assigned to the neighboring Memphis, Tennessee ADI, as are Dyer County and Pemiscot County, which lie to the west of Gibson and Crockett Counties.

9. In support of its petition, WMTU states that it is currently carried on three cable systems serving the communities within Gibson County. WMTU also submits a map showing that the station projects a Grade A signal over the entire county of Gibson, and thus blankets the communities of Humboldt, Milan, Trenton, Dyer, and Bradford with a Grade A signal. WMTU adds that the communities within Gibson County are no more than 30 miles[11] from Jackson, its city of license, and are similarly close in proximity to Alamo, Tennessee, the location of WMTU's transmitter. WMTU also notes that another station licensed to Jackson, WBBJ-TV (ABC, Channel 7), is carried on the cable systems serving all of the communities in question, except those located in Pemiscot County. Finally, with respect to viewing patterns, WMTU submits the 1992 Nielsen *County/Coverage Study* ("Nielsen Study") which demonstrates that, within Gibson County, WMTU possesses a weekly average quarter hour share of 14 and a weekly total average cume of 75 in non-cable county coverage. In cable county coverage, the Nielsen Study shows that WMTU possesses a weekly average quarter hour share of 2 and a weekly total average cume of 51.

10. Next, WMTU states that it is currently carried on two cable systems serving Alamo and Gadsden within Crockett County. WMTU also submits a map demonstrating that its

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[7] *MM Docket 92-259*, 8 FCC Rcd at 2977.
[8] *Id.* at n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.
[11] All mileage figures stated herein are approximations.

station covers both communities with a Grade A signal. In addition, WMTU states that, although the Alamo and Gadsden communities are part of the Memphis ADI, they are close in proximity to Jackson, WMTU's city of license.[12] WMTU notes that the systems also carry WBBJ-TV. Finally, the Nielsen Study indicates that, in Crockett County, WMTU possesses a weekly average quarter hour share of 8 and a weekly total average cume of 58 in non-cable coverage. In cable county coverage, the Nielsen Study demonstrates that WMTU achieves a weekly average quarter hour share of 3 and a weekly total average cume of 45.

11. With regard to Dyer County, WMTU states that its station is currently carried by the cable systems serving the communities of Dyersburg and Newbern. WMTU also submits a map demonstrating that its station provides a Grade A signal over each community. WMTU further states that each community is situated closer to WMTU's city of license than to its Memphis ADI. Specifically, WMTU states that each community is approximately 43 miles from Jackson, and no more than 24 miles from WMTU's transmitter in Alamo. To the contrary, WMTU notes that the Dyersburg and Newbern communities are at least 70 miles from Memphis. WMTU notes that the Dyersburg and Newbern systems also carry WBBJ-TV, and that the Dyersburg system also carries Station WLJT-TV (PBS, Channel 11), Lexington, Tennessee. Finally, WMTU submits Nielsen Study data which shows that WMTU possesses a weekly average quarter hour share of 13 and a weekly average cume of 50 in non-cable coverage in Dyer County. In cable county coverage, the Nielsen Study indicates that WMTU achieves a weekly average quarter hour share of 1 and a weekly total average cume of 26.

12. Henderson and Selmer, the next communities in question, are situated in Chester and McNairy Counties, respectively. WMTU states that, although it is not currently carried on any cable system serving Henderson, WMTU was carried on a system for at least two years prior to its elimination in September 1992. With respect to McNairy County, WMTU states that it has been carried and is currently carried on the cable system serving Selmer. WMTU also notes that in September 1993, the Commission granted WMTU's petition requesting "significantly viewed" status in both Selmer and Henderson.[13] WMTU adds that its station covers Chester County with a Grade A signal, and the community of Selmer with a Grade B signal. Both systems, notes WMTU, carry WBBJ-TV. Finally, the Nielsen Study indicates that in non-cable coverage for Chester County, WMTU has a weekly average quarter hour share of 9 and a weekly total average cume of 98. In cable county coverage, the Nielsen Study demonstrates that WMTU possesses a weekly quarter average of 2 and a weekly total average cume of 49. WMTU does not offer evidence of non-cable and cable county coverage for McNairy County.

13. Finally, with respect to Steele and Caruthersville, WMTU states that neither it nor its parent station, WLMT (Ind., Channel 30), Memphis, Tennessee,[14] is currently carried by any cable system serving the two Pemiscot County communities, despite the fact that both Steele and Caruthersville are covered with a Grade B signal. WMTU adds that Steele and Caruthersville are situated approximately 40 miles from WMTU's city of license, while at least 70 miles separate each community from Memphis. Finally, the Nielsen Study indicates that in non-cable coverage for Pemiscot County, WLMT has a weekly average quarter hour share of 3 and a weekly total average cume of 59. In cable county coverage, the Nielsen Study demonstrates that WMTU possesses a weekly total average cume of 23. WMTU contends that, because WLMT's signal is virtually unviewable off-the-air in Pemiscot County, the Nielsen data must be attributed to WMTU, whose signal *can* be viewed off-the-air.

ANALYSIS AND DECISION

14. WMTU has demonstrated in its petition that the Gibson, Crockett, Chester, McNairy, and Dyer County communities in question are logically included in its ADI market area for purposes of the cable television mandatory broadcast signal carriage rules under the standards set forth in §614(h) of the Communications Act, and its petition will accordingly be granted with respect to these communities. We first note that while WMTU has stated that it is currently carried on virtually all of the systems serving these communities, WMTU has failed to provide any information of historic carriage, despite the fact that each system has been in operation for more than 15 years. A review of industry publications reveals that in only four of the communities does WMTU have a history of carriage.[15] Nevertheless, WMTU has shown that it provides coverage of and service to all of the communities in question. All of the Gibson, Crockett, Chester, McNairy, and Dyer County communities are located within the station's predicted Grade A contour, save for Selmer, which is located within WMTU's predicted Grade B contour. This is sufficient to satisfy this second statutory factor.[16] We note, too, the proximity of the communities in these counties to Jackson, WMTU's city of license. Dyersburg, the furthest of these

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[12] According to WMTU, Alamo is located 20 miles from Jackson and is the site of WMTU's transmitter, while Gadsden is 13 miles from Jackson and 6 miles from WMTU's transmitter.

[13] *See Television Marketing Group of Jackson, Inc.*, Cable Television Actions Report No. 3468 (released September 10, 1993). For a network station to be deemed significantly viewed in a community or a county, it must achieve in non-cable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. §76.5(i).

[14] WMTU notes that it is a satellite for WLMT, which is licensed to the Memphis ADI. WMTU states that no confusion would result from the carriage of the WMTU signal in place of the WLMT signal, as the programming is co-identified as WLMT/WMTU, regardless of the transmission source.

[15] WMTU is currently carried on cable systems serving the following communities: Humboldt, Trenton, Dyer, Bradford, Alamo, Gadsden, Dyersburg, Newbern, and Selmer. We also note that, according to the Television & Cable Factbook, WMTU has been carried on the cable systems serving the Humboldt, Alamo, and Selmer communities since 1990, and the Newbern community since 1991. In addition, in 1992, WMTU was eliminated from the cable systems serving the communities of Milan and Henderson after two years of carriage. *See Television & Cable Factbook*, Cable Vols. 58-59 (1991 and 1992 ed.).

[16] The communities of Selmer, Steele, and Caruthersville are located within WMTU's Grade B contour. All other communities are located within the station's Grade A contour. *See also MM Docket 92-259*, 8 FCC Rcd at 2977, and paragraph 5, *supra*.

communities, is 43 miles from Jackson. The other communities lie within 35 miles of Jackson. With respect to the third factor, we believe that Congress did not intend this to be a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. Because other stations do appear to serve the cable communities at issue, this enhancement factor would not appear applicable.[17]

15. With respect to the fourth factor, WMTU has submitted evidence that it garners substantial viewing, except for those communities located in Pemiscot County. The viewing of WMTU set forth in the Neilsen data recited above is also reflected in recent Arbitron data, which co-identifies WMTU with WLMT due to the fact that WMTU, as a satellite for station WLMT, *see* footnote 14, *supra*, retransmits 100% of WLMT's programming. According to this Arbitron data, WMTU achieves a 21 share of viewing hours and a net weekly circulation of 67 in noncable homes and a 3 share and a net weekly circulation of 21 in cable homes in Gibson County. In McNairy County, WMTU achieves a 7 share and a net weekly circulation of 45 in noncable homes and a 2 share and a net weekly circulation of 29 in cable homes. In all homes, in Chester County WMTU achieves a 6 share and a net weekly circulation of 32; in Dyer County, WMTU achieves a 5 share and a net weekly circulation of 43; and in Crockett County, WMTU achieves a 6 share of viewing hours in all homes and a net weekly circulation of 45.[18] We reiterate that, with the exception of Selmer in McNairy County, which is encompassed by WMTU's Grade B contour, all these communities are within WMTU's Grade A contour, and all are closely proximate to WMTU's city of license. We recognize that these determinations are based on county-wide data, rather than on community-specific data. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type. As we have already noted, this data does not separate viewing attributable to WMTU from that of WLMT, since the former station is a 100% satellite of the latter station, and both stations broadcast essentially the same programming.[19] Therefore, although we will add the communities requested in Gibson, Crockett, Chester, McNairy, and Dyer Counties to WMTU's Jackson ADI, we note that for purposes of mandatory signal carriage, cable operators in those communities will be required to carry only one of the two stations WMTU and WLMT, because as defined by the Commission's mandatory carriage rules WMTU and WLMT carry duplicative programming. *See* §76.56(b)(5) of the Commission's Rules.

16. WMTU's evidence regarding Steele and Caruthersville within Pemiscot County, however, does not suggest a close association with WMTU or that the market structure should be revised. As noted above, the first statutory factor is not satisfied with respect to these communities. WMTU is not and has not been carried on the cable systems serving the communities of Steele and Caruthersville, Missouri. While WMTU may place a predicted Grade B contour over the two communities (the second statutory factor), turning to the question of viewing patterns (the fourth statutory factor), we note that WMTU retransmits 100% of programming which is already considered to be "local" by virtue of the fact that the parent station---WLMT---as well as thesubject communities are a part of the Memphis ADI. Nevertheless, data from the Nielsen Study submitted by WMTU indicates that, in Pemiscot County, WLMT has a weekly average quarter hour share of 3 and a weekly average cume of 59 in non-cable homes, while in cable homes, WLMT has a weekly quarter hour share of 0 and a weekly average cume of 23. WMTU states that this viewership should be attributed to it, as WLMT is virtually unviewable off-air in the county. *See* paragraph 13, *supra*. Recent Arbitron data demonstrates that the station has only a 3 share of the audience and a net weekly circulation of 31 in non-cable homes, and no recorded viewing in cable homes in the county.[20] While the Commission has not adopted a minimum level of acceptable share or net weekly circulation for satisfying the fourth statutory factor, these numbers, when compared with those of other area stations, do not show that WMTU's viewership in cable and non-cable homes in Pemiscot County rises to a level which demonstrates that the communities therein form part of WMTU's economic marketplace, particularly when compared with viewership of stations in the Memphis ADI.[21] Therefore, we will deny WMTU's petition requesting the

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[17] WMTU notes that another Jackson station, WBBJ-TV, whose Grade B coverage contour is similar to WMTU's, is carried on the cable systems serving the communities of Humboldt, Milan, Trenton, Dyer, Bradford, Alamo, Gadsden, Dyersburg, Newbern, Henderson, and Selmer, all of which systems---with the exception of Milan and Henderson---also carry WMTU. *See* note 15, *supra*. In addition, WMTU notes that the Dyersburg system also carries Station WLJT-TV (PBS, Channel 11), Lexington, Tennessee.

[18] *See* Arbitron, *Television County Coverage: Tennessee* (Cable Controlled Counties), 1993, and Arbitron, *Television County Coverage: Tennessee* (Standard/Fringe), 1993.

[19] On p. ii of the *Introduction* to its report, Arbitron provides the following explanation: "S-1 Satellites are satellite stations which, subject to circumstances below, simultaneously rebroadcast 100 percent of the parent station's programming. For purposes of this policy, the S-1 Satellite must rebroadcast programming (exclusive of commercials) of the parent station in its entirety. *** Viewing hour estimates are always reported in combination with the parent station. A'+' next to the parent's call letters indicates the combined viewing hour estimates of the parent and the S-1 Satellite."

[20] *See* Arbitron, *Television County Coverage: Missouri* (Cable-Controlled Counties), 1993.

[21] In Pemiscot County, WREG-TV (CBS, Channel 3) achieves an 8 share of viewing and a net weekly circulation of 48 in noncable homes, and a 7 share and a net weekly circulation of 78 in cable homes. WMC-TV (NBC, Channel 5) achieves an 11 share and a net weekly circulation of 64 in non-cable homes, and an 11 share and a net weekly circulation of 92 in cable homes. WKNO-TV (PBS, Channel 10) achieves a 1 share and a net weekly circulation of 23 in noncable homes, and a 1 share and a net weekly circulation of 35 in cable homes. WHBQ-TV (ABC, Channel 13) achieves a 15 share and a 51 net weekly circulation in noncable homes, and a 6 share and an 83 net weekly circulation in cable homes. Finally, WPTY-TV (Fox, Channel 24) achieves an 8 share and a 40 net weekly circulation in noncable homes, and a 6 share and a net weekly circulation of 83 in cable homes. *Id.*

inclusion of Steele and Caruthersville within the Jackson ADI for purposes of the cable mandatory broadcast signal carriage rules. With respect to the remainder of the communities in question, however, based upon the totality of the circumstances presented, we find that WMTU has justified grant of its petition.

ORDER

17. In view of the foregoing, we find that grant of WMTU's petition with respect to the named communities in Gibson County, Crockett County, Dyer County, Chester County, and McNairy County, Tennessee is in the public interest, but that grant of WMTU's petition with respect to Steele and Caruthersville in Pemiscot County, Missouri is not in the public interest.

18. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief (CSR-3921-A) filed September 27, 1993 by Television Marketing Group of Jackson, Inc. IS GRANTED to the extent indicated in paragraph 17, *supra*, and in all other respects IS DENIED. This change shall be effective in accordance with the following schedule: Television Marketing Group of Jackson, Inc. shall notify the cable systems in question in writing of its carriage and channel position elections, (§§76.56, 76.57, 76.64(f) of the Commission's Rules), within thirty (30) days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of such notification.

19. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

KADN Broadcasting, Inc. CSR-3888-A
Lafayette, Louisiana

For Modification of Station
KADN-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 8, 1995

By the Cable Services Bureau:

INTRODUCTION

1. KADN Broadcasting, Inc. ("KADN"), licensee of television station KADN, Lafayette, Louisiana (FOX, channel 15), has filed the captioned petition for special relief seeking to include the Louisiana communities of Franklin, Centerville, Charenton, Garden City, unincorporated St. Mary Parish, Verdunville, and Baldwin (collectively known as the "Franklin Communities") within the Lafayette, Louisiana "area of dominant influence" (ADI) for the limited purpose of obtaining signal carriage rights on the cable systems serving those communities.[1] Louisiana Television Broadcasting Corporation, licensee of television station WBRZ, Baton Rouge, Louisiana ("WBRZ") and AFLAC Broadcast Partners, licensee of television station WAFB, Baton Rouge, Louisiana ("WAFB") filed oppositions to the petition. KADN filed a consolidated reply to these oppositions.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its Report and Order in MM Docket 92-259,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factorsas:
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market con-

[1] On June 14, 1993, KADN filed a supplement to its petition for special relief which clarified that the request is intended to apply only to KADN and to no other station.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] *Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

sistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decisionmaking in these matters:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (i.e., when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue in this proceeding are all situated in the northwest portion of St. Mary Parish, Louisiana, which is now part of the Baton Rouge, Louisiana ADI. In its petition, KADN asks the Commission to modify its ADI so that the Franklin communities now in St. Mary Parish, may also be part of the Lafayette, Louisiana ADI. Specifically, KADN requests the Commission to assign Franklin, Centerville, Charenton, Garden City, unincorporated St. Mary Parish, Verdunville, and Baldwin to the Lafayette ADI so that it may assert signal carriage rights on the cable system serving those communities.

9. In support of its request, KADN states that it has provided a wide variety of public affairs programming, emergency information, local sports, and other programming serving the specific needs and "unique lifestyle" of the area known as "Acadiana" which encompasses the Franklin communities. KADN essentially argues that, despite Arbitron's determination that St. Mary Parish and the Franklin communities belong to the Baton Rouge ADI, the cable subscribers in this area, who share the culture and history of Acadiana, may lose access to the station's signal because of the Commission's signal carriage rules.[11]

10. Petitioner asserts that there is a "wealth of evidence" justifying the need to include the Franklin communities as part of the Lafayette ADI. This information, it adds, meets the requirements of the market modification provisions of the 1992 Cable Act and the Commission's implementing rules. First, the station argues that it has been historically carried on the area's cable system. KADN asserts that

[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. at 97 (1992).
[7] 8 FCC Rcd at 2977 (emphasis in original).
[8] *Id.* and n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.
[11] Petitioner provides a map illustrating that St. Mary Parish is "tacked" on to the "oddly shaped" Baton Rouge ADI. It claims that while the historical reasons for Arbitron's market determination are unknown, the Commission should not allow this conclusion to deprive Franklin community residents of television programming which has "for years" served their needs and interests.

Franklin-Baldwin Cable TV, the operator that serves the Franklin communities, has voluntarily carried the station since it went on-the-air in August, 1987.[12]

11. Next, KADN asserts that it provides local service to the Franklin communities. As a prologue to its argument, the station explains that the western portion of St. Mary Parish, which is separated from the eastern portion of the Parish by the Atchafalaya river, shares close cultural and social ties with Lafayette and Acadiana, but shares little with the Baton Rouge area. KADN states that it is located in Acadiana, is a part of Acadiana life, and considers the residents of Acadiana as its audience. These opinions, KADN explains, are supported by letters from elected officials in the Franklin communities.[13] KADN also explains that the Franklin communities are also geographically closer to Lafayette than they are to Baton Rouge.[14] Lastly, KADN states that it satisfies the local service requirement because its Grade B contour encompasses the principal headend of the cable system serving the afformentioned communities.

12. With respect to the amount of local programming offered by KADN, petitioner states that it has broadcast news, sports and entertainment programming of interest to residents in the Franklin communities. For example, KADN states that it has aired critical safety information during local emergencies. It also adds that it is the only station that has provided live coverage of Acadiana high school football. As for entertainment programming, KADN explains that, among other examples, it broadcasts a weekly ethnic entertainment program featuring guests playing Zydeco and other regional musical forms.

13. In its opposition, WBRZ asserts that KADN's petition should be dismissed because it is inconsistent and defective. WBRZ first argues that the petition does not contain the showings required by the television market modification provisions of the 1992 Cable Act and the Commission's *Report and Order* which addresses this subject. Specifically, KADN's pleading contains: (1) no express statement whether, and for how long, the local cable system has provided service to communities other thanFranklin and Baldwin; (2) no reliable information regarding the extent to which other broadcast stations supply programming of interest to the Franklin communities; (3) no evidence that KADN broadcasts significant news and public affairs programming directed to the Franklin communities;[15] and (4) no audience survey data showing the extent to which KADN is currently viewed in the Franklin communities.[16] In addition, WBRZ states that KADN's petition is flawed because it fails to distinguish viewership differences between the eastern portion of the Parish (in which the station acknowledges that it has few viewers) and the western part of the Parish (for whose viewers KADN's programming is "ostensibly designed") as it relates to unincorporated St. Mary Parish. Lastly, WBRZ challenges KADN's assertion that it is closer to the Franklin communities by pointing out that at least two of the towns, Centerville and Garden City, are outside the station's Grade B contour.[17]

14. In its opposition, WAFB also asks the Commission to deny KADN's petition.[18] WAFB specifically states that KADN has failed to specify whether any other station qualified for carriage provides coverage of news or programming of local interest. WAFB asserts that it has been carried for many years on the cable system serving the Franklin Communities and that such communities lie well within WAFB's Grade A contour. WAFB adds that because the area constitutes an important component of its coverage area, the station regularly carries news, sports, and entertainment programming of special interest to the "unique concerns" of the Franklin communities. For example, WAFB states that it broadcasts, among other local items, regular news reports from the Franklin communities, ongoing coverage of local sporting events in St. Mary Parish, and special cultural reports featuring a chef popular throughout the Franklin Communities. In sum, WAFB argues that it and other Baton Rouge television stations provide a significant amount of local programming thereby eliminating the necessity of the relief requested by KADN.

15. In its consolidated reply, KADN reiterates that it provides a valuable service to the Franklin communities and to deny the requested ADI modification would "disrupt long-established viewing patterns of the residents of those communities." In response to WBRZ's argument that its petition is inconsistent and defective, KADN argues that since the Commission expressly declined to establish any "absolute requirements" as to what information a petition for ADI modification must contain, the facts provided in its petition are more than adequate to prove the need for the Commission to modify the Lafayette, Louisiana ADI in the manner requested. KADN also clarifies that its petition pertains to the unincorporated portions of western St. Mary Parish outside the community of Franklin. As for WBRZ's argument regarding the historical provision of cable service to the Franklin communities, KADN responds that the Franklin system has provided cable service to each of the named communities for over twenty years.[19] KADN also asserts that the submission of letters and official "Resolution" orders reflecting the "heartfelt views" of Parish presi-

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[12] The station adds, that in contrast, the only independent station licensed in the Baton Rouge market signed on-the-air almost two years ago, but has never been carried by the Franklin system.

[13] *See* Petition at attachments C and D (Letter from the Honorable Oray Rogers, President of St. Mary Parish; letter from the Honorable Sam Jones, Mayor of Franklin, Louisiana). KADN explains that the statements of these officials is the best indication of viewing habits in the absence of ADI market data specifically culled from the Franklin communities.

[14] The Station explains that the Franklin communities are approximately 49 miles to Lafayette and 53 miles to Baton Rouge.

[15] WBRZ further argues that KADN has provided only general descriptions of the local programming it has broadcast and has not supplied the requisite program logs to support its contentions.

[16] WBRZ argues that the letters provided by KADN from area politicians do not substitute for audience surveys, which KADN does not provide, as an indication of the extent to which KADN is actually viewed in west St. Mary Parish or the Franklin communities.

[17] WBRZ also asserts that certain parts of unincorporated St. Mary Parish are in the eastern part of the Parish and outside the station's Grade B contour.

[18] WAFB states that it fully agrees with, and incorporates by reference to, the arguments made by WBRZ in its opposition.

[19] KADN asserts that it cannot be faulted for failing to state a fact that is in the public record and that goes beyond any information that the Commission said it might find useful in evaluating ADI modification requests.

dents, mayors and city councils, are as probative as "mere statistics or the detached speculation of distant observers" and should be afforded substantial deference in determining whether a community considers a television station to provide "local" service for this purpose. Finally, KADN argues that the determination of "localism" for purposes of an ADI modification should not be a contest between stations to see which provides more local news and informational programming targeted to a particular community.[20]

ANALYSIS AND DECISION

16. KADN has not provided sufficient evidence to justify its market modification request and its request will accordingly be denied. Of the factors specified in the 1992 Cable Act, we find that KADN has fully met only one of the four statutory elements -- the historical carriage requirement. KADN demonstrates that the station has been carried on the Franklin cable system since 1987. While this factor is entitled to substantial weight, it does not by itself and in the absence of satisfactory evidence satisfying the other tests, demonstrate that a change in its market boundary is warranted.

17. With respect to the other factors, KADN has not provided any audience survey data. The absence of this information is particularly notable in light of the specific indication in the statute, referenced above, that the Commission should consider "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community" and the absence of any indication as to why this information might be unavailable or not relevant in this situation. Thus, we conclude, KADN has not sufficiently demonstrated that it is watched by residents in the Franklin communities. In particular, it has not submitted independent audience survey data to demonstrate viewing in the relevant communities. Although KADN suggests that St. Mary Parish has been included in the Baton Rouge ADI by Arbitron for "unknown" reasons, it has not provided audience data that would suggest that the usual "preponderance" of audience test (see paragraph 2 above) has not been applied. The testimonials submitted by the petitioner are not an adequate substitute for such data.

18. With respect to coverage and other local service to the cable community, we note that the geographical distance between the Franklin communities and Lafayette (49 miles) is not significantly different from the distance between the communities and Baton Rouge (53 miles) thus foreclosing a waiver based upon proximity considerations. The station cannot justifiably argue that since it is four miles closer to Lafayette than it is to Baton Rouge, it should be included in the ADI of the former rather than the latter. KADN's transmitter is even more distant from the Franklin communities than is its community of license and the station's Grade B contour covers only part of Franklin. And, as WBRZ points out, Centerville, Garden City and certain unincorporated areas of St. Mary Parish, are entirely outside KADN's Grade B contour. In contrast, a number of stations from the Baton Rouge market place Grade A contours over Franklin and Grade B contours over the entire St Mary Parish.

19. Finally, the arguments presented by WAFB persuade us that there is at least one other station from a different market carried on the Franklin cable system that provides news and sports coverage relevant to the Franklin communities. While we do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue,[21] the presence of WAFB's signal on the Franklin cable system does not permit this factor to weigh toward grant of the request.

ORDER

20. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed June 5, 1993 by KADN Broadcasting, Inc. IS DENIED.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[20] Rather, the station states, the determination is based on numerous factors "all of which are designed to prevent a situation where the must carry rules operate so as to deprive viewers of a television station that they have enjoyed for years and that they consider to be important in their lives."

[21] *See* 8 FCC Rcd 8544, 8546 at para. 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Pentecostal Revival Association, Inc. against Cablevision Industries of Middle Florida, Inc. CSR- 4307-M

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 8, 1995

By the Cable Services Bureau:

1. The Pentecostal Revival Association ("PRA"), licensee of low power television station W49AW ("W49AW"), Palatka, Florida, filed a petition for reconsideration of a *Memorandum Opinion and Order* released January 4, 1995 by the Cable Services Bureau. In that *Order*, the Bureau denied W49AW's request for carriage on Cablevision Industries of Middle Florida, Inc.'s ("CVI") Palatka, Florida cable system because its must carry complaint was untimely filed and procedurally defective. This petition is unopposed.

2. W49AW argues that the Commission has neglected to put important events in proper chronological order and, as a result, incorrectly dismissed its complaint as untimely. The station explains that it signed on-the-air in December of 1991 and shortly thereafter requested cable carriage on CVI's Palatka cable system even though Congress did not yet enact the 1992 Cable Act which codified an LPTV station's qualified right of cable carriage. W49AW states that even after the Act was passed, it mistakenly assumed that it was not a "qualified" LPTV station because it did not believe it met all six statutory factors for LPTV carriage.[1]

3. In April of 1993, W49AW states that it received information about the Commission's commercial leased access rules which prompted it to write a letter to CVI on June 21, 1993 asking if the operator would be willing to lease a channel to the station. W49AW argues that the Bureau mistakenly took a paragraph from this same letter out of context and interpreted it to be a request for carriage. The station also asserts that CVI's July 13, 1993 response to its request was solely a rejection of its commercial leased access inquiry and did not function as a rejection of a request for carriage.

4. In May of 1994, W49AW states that it again reviewed the must carry rules and was prompted to ask for clarification from the Commission about its status under 47 C.F.R. §76.55; according to the station, the Commission replied to the letter in November, 1994 which confirmed that Putnam County, Florida, was outside the Jacksonville, Florida MSA. The station states that it also called the Commission in June of 1994 to ask the same question and found out that it was a qualified LPTV station; shortly thereafter on June 21, 1994, it wrote CVI and requested carriage based on this information. The station filed a must carry complaint on August 16, 1994, with the Commission after the operator failed to respond to this request. W49AW argues that based on the facts presented, "the statute of limitations for W49AW to make petition to the FCC" has not expired and that "the undeniable qualification of W49AW for carriage right should not be allowed to disappear due to one line of a letter taken out of context." The station asserts that the Commission should therefore reverse its initial decision that its complaint was untimely filed.

5. W49AW also argues that the Commission should reverse its decision that its initial complaint was incomplete because it did not include an attached certificate of service. It argues that it has sent all relevant material to CVI and has supplied a certificate of service in this petition for the three preceding submissions. The station pleads that the Commission recognize that compliance with the service rule is more important than the "associated technicality of the rule."

6. We deny W49AW's petition for reconsideration. After reviewing the facts presented herein and the pleadings underlying the original *Memorandum Opinion and Order*, we find that the station has not presented any new evidence which alters the factual scenario and requires us to change our initial decision. We therefore reaffirm our finding that the language of W49AW's June 21, 1993 letter to CVI to be a request for carriage. Although petitioner presently asks us to discount the phrase ". . . make possible a channel on your cable system so that we may reach the many in your community who do not have the pleasure of antennas . . ." we continue to interpret this to be a signal carriage request. The Commission's rules setting forth must carry complaint procedures are quite clear. "No must carry complaint filed pursuant to §76.61 will be accepted by the Commission if filed more than sixty (60) days after the . . . denial by a cable television system operator of a request for carriage . . . ."[2] W49AW's complaint was untimely because it was filed on August 19, 1994, more than 13 months after CVI formally denied the station's carriage request on July 13, 1993. We also reaffirm our conclusion that the station did not adhere to our rules because it did not provide a certificate of service along with its petition and it neglected to serve a copy of the complaint on the local franchising authority. The station's current filing of certificates of service for prior pleadings are immaterial because they do not have a retroactive effect.

7. Accordingly, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petition for reconsideration, filed January 27, 1995 by the Pentecostal Revival Association, IS DENIED.

8. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

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[1] W49AW maintains that it wrongfully assumed that Putnam County, Florida, which encompasses the city of Palatka, fell inside the Jacksonville, Florida MSA and since Jacksonville is within the top 160 MSAs, the station was unqualified.

[2] 47 C.F.R. §76.7(c)(4)(iii).

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Consolidation of the Functions
and Staff of the Baltimore
Office into the Laurel Office
and Closure of the Baltimore
Office

ORDER

Adopted: April 11, 1995; Released: May 8, 1995

By the Commission:

1. The Commission hereby consolidates the functions and staff of the Baltimore Office of the Compliance and Information Bureau (CIB) into the Laurel Office and closes the Baltimore Office.

2. Although in the past these offices have served different functions, the Bureau is now restructuring its operations so that both offices will perform the same activities. Because these offices are only seventeen(17) miles apart and serve essentially the same areas it will be more efficient to consolidate their functions into a single location. Although the consolidation will provide a marginal decrease in service to Baltimore it will enhance service to Washington, D.C. In addition, response to problems in Western Maryland, the Eastern Shore, Delaware, and West Virginia will not change significantly.

3. Moreover, because the Commission owns the property in Laurel and leases the office space in Baltimore, this consolidation will result in more efficient use of CIB resources. Transferring the functions and staff to Laurel will substantially decrease lease expenses, reduce space costs by seventy-five percent, and cause a decrease in the supervisor to employee ratio. Also significant reductions in administrative costs will result.

4. Accordingly, IT IS ORDERED THAT the staff and functions of the Baltimore Field Office be consolidated into the Laurel Field Office and that the Baltimore Field Office be closed.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendments to the amateur service rules including amendments for examination credit, eligibility for a club station license, recognition of the volunteer examiner session manager, a special event call sign system, and self-assigned indicator in the station identification.	WT 95-57 RM-8301 RM-8418 RM-8462

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1995; Released: May 8, 1995

Comment date: July 14, 1995
Reply comment date: August 14, 1995

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes various changes to the amateur service rules that have been requested by members of the amateur service community. On January 6, 1994, the American Radio Relay League, Inc. (ARRL), requested in petition RM-8418 that a former licensee be allowed to obtain a new amateur operator license without passing the requisite qualifying examinations again. Petition RM-8462, also filed by ARRL, on April 4, 1994, requests that the rules be amended to increase to four persons the minimum number of members required to constitute an organization eligible for a club station license. On July 15, 1993, the National Conference of Volunteer-Examiner Coordinators (NCVEC) filed petition RM-8301 for amendment of the rules to provide for a volunteer examiner (VE) on-site manager at license examination sessions. We are also proposing rules for a special event station vanity call sign system.[1] Finally, we are proposing a rule amendment that would provide licensees with greater flexibility when an amateur station is using self-assigned indicators with the call sign. Our specific proposals are discussed more fully below.

II. DISCUSSION

EXAMINATION CREDIT

2. In petition RM-8418, the ARRL wants to encourage former amateur operators to become involved again in the technical self-training and public service communications opportunities provided by the amateur service. The ARRL believes that former license holders whose interest is rekindled should be permitted to re-enter the amateur service without reexamination.[2] We believe that the ARRL's position has merit. Former license holders previously passed examinations demonstrating that they qualified for the class of operator license held. Further, this proposal would relieve the VEs from the burden of preparing and administering examinations for former license holders. We propose, therefore, to authorize administering VEs to give examination element credit for any examination that the applicant previously passed in obtaining the former license. We also solicit comments concerning the criteria that we should use to allow any other qualified persons similarly situated (such as former and current holders of other types of operator licenses issued by the Commission, other United States government agencies, and foreign governments) to obtain examination credit, without examination, for amateur operator licenses.

CLUB ELIGIBILITY

3. Petition RM-8462 concerns the minimum number of club members required for a club station to be eligible for a license. We have resumed the issuance of new club station licenses.[3] Therefore, ARRL believes that it is important for the Commission to determine that the applicants therefor are legitimate clubs and not just persons pursuing an additional call sign. The ARRL states that only 10 of its 1,957 affiliated clubs have less than four members and, therefore, recommends that a minimum of four members be required.[4] We believe there is merit in ARRL's suggestion. Requiring four members, rather than two, would assist in ensuring that radio clubs are *bona fide* organizations. Accordingly, we propose to increase the eligibility requirement to four persons for a club station license.

VE SESSION MANAGER

4. Although the volunteer-examiner coordinator (VEC) system -- now in its twelfth year of operation -- is an outstanding success,[5] NCVEC believes that the rules should provide uniform standards for the on-site manager for each examination session. In RM-8301, NCVEC requests that the VE session manager be recognized in the rules as the person in charge of the session. Often there are examinees at the session[6] who are seeking a class of license that requires examination in more than one element.[7] Where there are many examinees, the VE session manager increases examination efficiency by organizing as many VEs as necessary into teams with each team administering a

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[1] *See Report and Order* in PR Docket No. 93-305, adopted December 23, 1994, 10 FCC Rcd 1039 (1995), at para. 13.

[2] Petition for rule making at 3 and 4.

[3] *See Report and Order* in PR Docket No. 93-305, *supra*.

[4] Section 97.5(b)(2) of the Commission's Rules, 47 C.F.R. § 97.5(b)(2), currently requires a club to be composed of at least two persons.

[5] During 1994, amateur radio examinations were administered to 106,670 persons.

[6] The number of examinees at any one session varies from one to several hundred. In 1994, the average was nine examinees.

[7] The requirements for the six classes of amateur operator license consist of passing one or more of the eight different examination elements. *See* Section 97.501 of the Commission's Rules, 47 C.F.R. § 97.501.

particular element. The ARRL[8] commented that the current requirement for three VEs to administer each examination ensures the integrity of the examination system. The ARRL also believes that placing the responsibility for the propriety of the examination on one person only dilutes the joint and several liability of all three VEs.[9]

5. We propose to amend the rules to recognize the role of the VE session manager as the person who plans, keeps records, organizes, and supervises the activities of the administering VEs at each session. In our 1993 Financial Inquiry, we solicited information from sixty VEs. The responses of the VEs indicate that many VEs have organized themselves into teams locally and that a team tends to answer to a leader. The team leader is often the only VE who is reimbursed and maintains records. *See* letter of April 15, 1994, from Chief, Personal Radio Branch to sixty VEs. We also propose that each examination element continue to be administered by at least three VEs.[10] The presence of at least three VEs will provide the VEC with first-hand observers who can monitor the performance of the VE session manager and the other VE(s). This will preserve the cross-checking favored by the ARRL, while recognizing the role of the VE session manager as requested by NCVEC.

SPECIAL EVENT VANITY CALL SIGN SYSTEM

6. In PR Docket No. 93-305, we set aside the one-by-one call sign block until the matter of a special event vanity call sign system could be addressed in a separate proceeding.[11] A one-by-one call sign consists of a single prefix letter (K, N, or W), the region number (0 to 9), and a single suffix letter (A to Z). There are 780 such call signs. We will address the special event vanity call sign system in this *Notice*. In its comments concerning the vanity call sign system, ARRL had requested that one-by-one call signs be reserved for assignment to stations operating in conjunction with short-term events of special significance. A special event vanity call sign system will meet the needs of amateur operators for temporary operation of their stations during events that are of special significance to the amateur service community. We propose, therefore, to establish a special event vanity call sign system. Under this approach, the licensee making the request, at least 120 days prior to the event, would be required to indicate the nature of the event and would have to certify that it is of special significance to the amateur service community. In addition, the licensee would submit a list of one-by-one format call signs, in order of preference. The first assignable call sign on the list would be stamped "granted" and a copy of the list would be returned to the person making the request. The special event vanity call sign could be used for a period not to exceed that of the special event, or for 15 days, whichever is less. We request comments on this proposed special event vanity call sign system.

SELF-ASSIGNED INDICATOR

7. The Commission has received several informal requests for clarification of Section 97.119(c) of the Commission's Rules, 47 C.F.R. § 97.119(c), concerning station identification. Paragraph (c) provides: "An indicator may be included with the call sign. It must be separated from the call sign by the slant mark or by any suitable word that denotes the slant mark. If the indicator is self-assigned, it must be included after the call sign and must not conflict with any other indicator specified by the FCC Rules or with any prefix assigned to another country." Specifically, the requests concern including a self-assigned indicator before rather than after the assigned call sign as provided in the current rule.[12] We believe that allowing indicators to be included before, after, or both before and after, the assigned call sign will provide the amateur service community with greater flexibility when making the station identification announcement. We propose, therefore, to amend the rule accordingly.

III. CONCLUSION

8. In view of the foregoing, we propose to amend the amateur service rules to allow former amateur operators to obtain amateur service licenses without examination, to increase the minimum number of persons comprising an organization eligible for a club station license, to recognize the role of the VE session manager, to establish a special event vanity call sign system, and to provide licensees with greater flexibility when making a station identification announcement. These proposed rule changes are intended to be responsive to the needs of the public and to the radio services that we administer.

IV. PROCEDURAL MATTERS

Regulatory Flexibility Act

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because promulgation of the proposed rule amendments will not create significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur stations that are the subject of this proceeding would not be authorized to transmit any communications where the station licensee or control operator has a pecuniary interest. The Secretary shall send a copy of the *Notice of Proposed Rule Making*,

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[8] The activities of the ARRL are separate from the ARRL/VEC. The ARRL/VEC has made a persuasive showing to the Commission that preventive measures have been taken to preclude any possible conflict of interest with the ARRL which publishes and distributes materials used to obtain an amateur operator license. *See* Section 97.521(e) of the Commission's Rules, 47 C.F.R. § 97.521(e).

[9] Comments of ARRL at 4.

[10] Section 97.509(a) of the Commission's Rules, 47 C.F.R. § 97.509(a), currently requires each examination to be administered by three VEs.

[11] *See Report and Order* in PR Docket No. 93-305, *supra*.

[12] For example, the licensee of amateur station W1AA in Boston, Massachusetts, decides to operate the station while vacationing in the Virgin Islands. In order to direct more attention to the station, the licensee may include a self-assigned indicator, such as /KP2, in the station identification announcement. (Stations located in the Virgin Island are normally assigned a call sign with the prefix KP2, NP2, or WP2.) The call sign given in the station announcement, therefore, would be W1AA/KP2. We propose to permit also the station announcement KP2/W1AA and KP2/W1AA/KP2.

including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1980).

Ex Parte Rules - Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as specified in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

11. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **July 14, 1995**, and reply comments on or before **August 14, 1995**. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission (Room 239), 1919 M Street, N. W., Washington, DC 20554.

Ordering Clause

12. Accordingly, IT IS ORDERED that, pursuant to Sections 4(f)(4)(B) and (i), and 303(a), (l)(1), and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(f)(4)(B) and (i), and 303(a), (l)(1), and (r), notice is hereby given of proposed amendments to Part 97 of the Commission's Rules, 47 C.F.R. Part 97, in accordance with the proposals, discussions, and statement of issues in this *Notice of Proposed Rule Making*. Comment is sought regarding such proposals, discussions, and statement. Rule making petitions RM-8301, RM-8418, and RM-8462 ARE GRANTED to the extent indicated herein, and ARE DENIED in all other respects.

Contact Person

13. For further information concerning this proceeding, contact Maurice J. DePont, Wireless Telecommunications Bureau, (202) 418-0690.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment: Appendix

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 97 - Amateur Radio Service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. In Section 97.3, paragraph (a)(11)(ii) is redesignated as paragraph (a)(11)(iii), and new paragraphs (a)(11)(ii) and (47) are added to read as follows:

§ 97.3 Definitions.

* * * * *

a) ***

(11) ***

(i) ***

(ii) *Special event call sign system.* The call sign is selected by the FCC from a list of call signs requested by the licensee. The call sign is shown on the request. It is temporarily substituted for the call sign shown on the license while the station is transmitting in conjunction with an event of special significance to the amateur service community.

* * * * *

(47) *VE session manager.* The VE designated by the administering VEs to plan, organize, keep records, and directly supervise the activities of other VEs at a session where examinations for amateur operator licenses are administered.

* * * * *

3. Section 97.5(b)(2) is revised to read as follows:

§ 97.5 Station license required.

* * * * *

(b) The types of station licenses are:

(1) ***

(2) A club station license. A club station license is granted only to the person who is the license trustee designated by an officer of the club. The trustee must be a person who has been granted an Amateur Extra, Advanced, General, Technician Plus, or Technician operator license. The club must be composed of at least four persons and must have a name, a document of organization, management, and a primary purpose devoted to amateur service activities consistent with this Part. The club station license document is printed on FCC Form 660.

* * * * *

4. In Section 97.19, the heading and paragraph (a) are revised and new paragraph (e) is added to read as follows:

§ 97.19 Application for a vanity call sign or a special event station call sign.

(a) A person who has been granted an operator/primary station license or a license trustee who has been granted a club station license is eligible to make application for modification of the license, or the renewal thereof, to show a call sign selected by the vanity call sign system or the special event station call sign system. RACES and military recreation stations are not eligible for a vanity call sign or a special event station call sign.

* * * * *

(e) Each request for a special event station call sign must be received at the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245 at least 120 days prior to the special event.

(1) The request must include:

(i) The licensee's name, address, and primary station call sign.

(ii) A signed statement indicating the nature of the event and certifying that it is of special significance to the amateur service community.

(iii) The time period during which the special event station will operate. In no case will the period exceed that of the special event, or 15 days, whichever occurs first.

(iv) A list from the person making the request of one-by-one format call signs, in order of preference.

(2) The first assignable call sign from the list will be indicated on the request, that call sign will be stamped *GRANTED*, and a copy of the list showing the call sign granted will be returned to the person making the request. The call sign will be selected from those call signs assignable at the time the request is processed by the FCC.

5. Section 97.119(c) is revised to read as follows:

§ 97.119 Station identification.

* * * * *

(c) One or more indicators may be included with the call sign. Each indicator must be separated from the call sign by the slant mark (/) or by any suitable word that denotes the slant mark. If an indicator is self-assigned, it must be included before, after, or both before and after, the call sign. No self-assigned indicator may conflict with any other indicator specified in this section or with any prefix assigned to another country.

6. Section 97.505 is revised by redesignating paragraph (a)(10) as paragraph (a)(11) and adding new paragraph (a)(10) to read as follows:

§ 97.505 Element credit.

(a) ***

(10) An expired FCC-issued amateur operator license: The least elements required for the operator license formerly held. No examination credit will be given if the operator license was suspended for the remainder of the license term, if the operator license was surrendered to avoid enforcement proceedings, or if the operator license expired following revocation of the associated station license. Examination credit, however, will be given if the suspension period of the operator license was subsequently modified to denote a lesser time period.

* * * * *

7. Section 97.509(a) is revised to read as follows:

§ 97.509 Administering VE requirements.

(a) Each examination element for an amateur operator license must be administered by at least 3 administering VEs at an examination session. There must be a VE session manager who is in attendance during the entire session.

* * * * *

8. New Section 97.515 is added to read as follows:

§ 97.515 VE session manager requirements.

(a) The VE session manager must be accredited as a VE by the same VEC that coordinates the examination session.

(b) Before each examination session, the VE session manager must make a public announcement stating the location and the time of the session. The number of examinees may be limited.

(c) The VE session manager is responsible for supervising the activities of the administering VEs and the conduct of the examinees. The VE Manager may serve concurrently as an administering VE.

(d) The VE session manager must maintain a log for the session. The log must include the names of the examinees, the names of the administering VEs, and the examination elements administered by each VE.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Copley/Colony Cablevision of Cypress, Inc.
Cypress, California — CUID No. CA1203

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Copley/Colony Cablevision of Cypress, Inc. ("Colony") was charging for its cable programming service ("CPS") tier in Cypress, California, CUID No. CA1203. Colony has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Colony's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in Cypress, California, CUID No. CA1203, was completed and served on Colony on January 4, 1994 and received by the Commission on January 7, 1994.

5. Colony attempted to justify its CPS price through an FCC Form 393 filed on February 14, 1994. Colony amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings,[12] and on February 14, 1995, in response to an inquiry by Commission staff.

III. DISCUSSION

6. In its amended benchmark filings of June 24, 1994 and January 24, 1995, Colony calculated a maximum permitted price for the CPS tier of $7.11 per month. Upon review of Colony's filing, as amended, we have found no apparent errors that would require a recalculation of Colony's maximum permitted CPS price. However, Colony's

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Colony has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Colony implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Colony's price for the period after May 14, 1994 may be required to reflect the fact that Colony's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

actual price for the CPS tier was $7.56 per month. Thus, Colony has failed to demonstrate that its price for the CPS tier was not unreasonable.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Colony's showing supports a maximum reasonable CPS tier price of $7.11 per month (plus franchise fee) for the period Janaury 7, 1994 to May 14, 1994.[13]

8. We further conclude that Colony must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Colony's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to Colony's price for the period after May 14, 1994, upon completion of our review of Colony's FCC Form 1200 rate filing.

9. We further conclude that Colony has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve Colony of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 4, 1994 complaint against the cable programming service price charged by Copley/Colony Cablevision of Cypress, Inc. in Cypress, California, CUID No. CA1203, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Copley/Colony Cablevision of Cypress, Inc. with respect to Cypress, California, CUID No. CA1203, for the period of January 7, 1994 to May 14, 1994, justifies a maximum price of $7.11 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Copley/Colony Cablevision of Cypress, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 7, 1994[16] to May 14, 1994, that exceeded $7.11 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Copley/Colony Cablevision of Cypress, Inc. shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Copley/Colony Cablevision of Cypress, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing for Cypress, California, CUID No. CA1203, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Copley/Colony Cablevision of Cypress, Inc. shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for Cypress, California, CUID No. CA1203, that reflects the reduction in the CPS rate determined in this Order. 16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Copley/Colony Cablevision of Cypress, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

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[13] This finding is based solely on the representations of Colony listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed Colony's Form 1200 rate filing and confirmed that Colony calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[16] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies Transmittal No. 369
Tariff F.C.C. No. 1

ORDER

Adopted: March 10, 1995; Released: March 10, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On February 10, 1995, NYNEX Telephone Companies (NYNEX) filed Transmittal No. 369 to make within band, within price cap adjustments to its rates for certain channel terminations for access services within the Trunking Basket. In addition, NYNEX proposes in this filing to reduce to zero the nonrecurring charges associated with channel terminations and channel mileage facilities for monthly broadcast video services. Finally, NYNEX submitted with Transmittal No. 369 a revised Price Cap Index for the Interexchange Basket resulting from a rate increase for Carrier Common Line minutes of use as filed on January 27, 1995, under Transmittal No. 367.[1]

2. On February 17, 1995, MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal No. 369. MCI argues that Transmittal No. 369 is a "below band" filing and thus requires cost support treatment specified by the price cap regulations.[2] MCI contends that while NYNEX does not claim any rate changes for its DS1 service, NYNEX's price cap tariff review plan, filed with Transmittal No. 369, indicates that rate changes have in fact occurred and resulted in a lower service band index (SBI) for that service.[3] Therefore, MCI claims, NYNEX's filing is subject to the Commission's requirement that NYNEX submit materials showing that its changed rates were above service costs.[4]

3. In its reply filed February 27, 1995, NYNEX maintains that Transmittal No. 369 is not a below-band filing because NYNEX does not propose any changes resulting in below-band rates.[5] NYNEX explains that the changes in the SBIs and sub-indexes for the DS1 service sub-category is due to shifts in the allocation of New York State Gross Income Tax (GIT) amounts among service categories. According to NYNEX, the allocation method it uses to apportion GIT dollars in each price cap service category caused GIT amounts in other service categories, including the DS1 service sub-category, to decline when the rates for certain channel terminations for access services within the Trunking Basket were increased. Therefore, NYNEX contends, the changes in the SBIs and DS1 sub-indices for the DS1 service sub-category was due solely to the methodology that NYNEX used to reflect GIT in the price cap model and does not cause Transmittal No. 369 to be classified as a below-band filing.[6]

4. The Tariff Division has reviewed NYNEX's Transmittal No. 369 and the related pleadings. We conclude that no compelling argument has been presented that this tariff is patently unlawful so as to warrant rejection.

5. Accordingly, IT IS ORDERED that the petition to reject NYNEX's Transmittal No. 369 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] NYNEX submitted the support data required by Section 61.49(a) of the Commission's rules, 47 C.F.R. § 61.49(a), with Transmittal No. 369.
[2] MCI Petition at 3-4.
[3] *Id.* at 3.
[4] *Id.* at 4, citing Section 61.49(d) of the Commission's rules, 47 C.F.R. § 61.49(d).
[5] NYNEX Reply at 2.
[6] *Id.* at 2-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 13, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON US WEST'S REQUEST FOR EXTENSION OF ITS TECHNICAL TRIAL OF VIDEO DIALTONE SERVICE

FILE NO. W-P-C-6868

On March 8, 1995, US West Communications, Inc. (US West) filed a request for an extension of its Section 214 authorization to conduct a technical trial of video dialtone service in portions of the Omaha, Nebraska, area. The Commission initially granted US West limited authorization to conduct a technical trial for six months and a market trial for twelve months. (*See Application of US West Communications, Inc. For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area*, 9 FCC Rcd 184 (1993) (*Order and Authorization).*

US West believes that its authorization for the technical trial may end on April 3, 1995. US West states that it and its programmer customers need additional time to test analog and digital services, and that it expects to be in a position to initiate its market trial in mid-June 1995. US West, therefore, requests an extension of its technical trial until it has an effective market trial tariff in place or for a six month period, whichever comes first.

Interested parties are invited to file comments or reply comments on the request. Comments should be filed by **March 20, 1995**, and reply comments should be filed by **March 24, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the request can be obtained from ITS at (202) 857-3800. The request is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 13, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON COMPTEL'S FILING IN CC DOCKET NO. 92-77 PROPOSING A RATE CEILING ON OPERATOR SERVICE CALLS
AND
PLEADING CYCLE EXTENDED ON PETITION FOR RULEMAKING OF NATIONAL ASSOCIATION OF ATTORNEYS GENERAL PROPOSING ADDITIONAL DISCLOSURES BY SOME OPERATOR SERVICE PROVIDERS
RM-8606

On March 7, 1995, the Competitive Telecommunications Association, the American Public Communications Council, Bell Atlantic, BellSouth Telecommunications, MFS Communications, NYNEX, Teleport Communications Group, and US West filed an *ex parte* proposal in CC Docket No. 92-77 for a rate ceiling on "0+" operator service calls – calls made by simply entering "0" plus the number to be called, without the use of an "access code." The proposal would adopt a benchmark rate on a simple per minute basis, without regard to time-of-day, distance, or whether the call was handled on an automated or live basis, or made with a calling card or collect. The petitioners propose this ceiling as an alternative to billed party preference (BPP), contending that it could be implemented much more quickly and much less expensively than BPP.

Interested parties are asked to file comments on this proposal by **April 12, 1995** and reply comments by **April 27, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, DC 20554. A copy should also be sent to the Commission's contractor for public service records ITS, Inc., 2100 M Street, NW, suite 140, Washington DC 20037, 202-857-3800. Parties may inspect the pleadings in this proceeding during normal business hours, in the FCC's Record Center (Room 239), 1919 M Street, NW, Washington, D.C. 20554. Copies also can be obtained from the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., suite 140, Washington, D.C. 20037, (202) 857-3800.

Furthermore, to ease the administrative burden in this proceeding, the deadlines for filing comments and reply comments on the Petition for Rulemaking filed by the National Association of Attorneys General, RM-8606, which proposes increased disclosures by operator service providers, are extended to match the dates above. Furthermore, parties should address both proposals in a single set of comments.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

Before the
Federal Communications Commission
Washington, D.C. 20554

GC DOCKET NO. 95-21

In the Matter of

Amendment of 47 C.F.R. § 1.1200
et seq. Concerning Ex Parte
Presentations in Commission
Proceedings

ORDER

Adopted: March 13, 1995; Released: March 15, 1995

1. Under consideration by the Commission is a Motion to Extend Time in Which to File Comments and Replies filed March 8, 1995 by the Federal Communications Bar Association (FCBA).

2. The FCBA requests that the time for filing comments and reply comments in this proceeding be extended until June 14, and June 29, 1995, respectively. It asserts that this additional time is required to afford it an opportunity to ascertain the thinking of its members and prepare effective comments following both an April 25, 1995 seminar, to be held in conjunction with the FCBA's Continuing Legal Education Committee, which will address the issues raised in this proceeding, and consideration of the views expressed there by the FCBA's Executive Committee at its regularly scheduled meeting on May 23, 1995. It appears that immediate action on this Motion is warranted, pursuant to 47 C.F.R. § 1.45(e), so that all interested parties will have prompt notice of the pertinent filing deadlines.

3. After careful consideration of the Motion, we have determined that the FCBA has not made a showing that would warrant extending the time to the full extent requested. Given the fact that the primary purpose of this proceeding is to proceed without undue delay to improve the public's ability to communicate with the Commission in a manner that comports with fundamental principles of fairness, the public interest will be best served by a four week extension of time for the filing of comments and reply comments.

4. ACCORDINGLY, IT IS ORDERED, Pursuant to the authority delegated under 47 C.F.R. § 0.251(b) that the Motion to Extend Time in Which to File Comments and Replies filed March 8, 1995 by the Federal Communications Bar Association IS GRANTED in part and IS DENIED in part and that the time for filing comments and reply comments IS EXTENDED to April 13, 1995 and April 28, 1995.

FEDERAL COMMUNICATIONS COMMISSION

William E. Kennard
General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1995

SNET PETITIONS FOR WAIVER OF PART 69 RATE STRUCTURE, FILES TARIFF INTRODUCING VIDEO DIALTONE MARKET TRIAL IN CONNECTICUT, INCLUDES ACCOUNTING AND COST ALLOCATION PLAN

Comments/Petitions: March 29, 1995
Replies: April 7, 1995

On March 9, 1995, The Southern New England Telephone Company (SNET) filed a petition for expedited waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to introduce a rate structure and tariff rate element for video dialtone service for its market trial. Specifically, SNET seeks to waive Sections 69.110 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.110 and 69.112, to establish the following video dialtone tariff rate structure and rate element: a broadcast connection charge, which is a recurring monthly rate to be charged to programmer-customers on a per 6 MHz basis. SNET also requests a waiver of Section 69.305(b) of the Commission's Rules, 47 C.F.R. § 69.305(b), to allow it to assign the video dialtone investment included in Cable and Wire Facilities Category 2 directly to the appropriate rate element.

On March 9, 1995, SNET also filed Transmittal No. 641, revising SNET's Tariff F.C.C. No. 40 to introduce its proposed video dialtone market trial in two areas for Connecticut in accordance with the terms of its waiver request. The market trial is to last for one year. Transmittal No. 641 was filed on 53 days' notice and has a scheduled effective date of May 1, 1995. As part of its Description and Justification for Transmittal No. 641, SNET filed its Accounting and Cost Allocation Methodology plan. Under the terms of SNET's Section 214 Authorization for the market trial, it is required to file and obtain approval of an accounting and cost allocation plan before offering local exchange and exchange access telephone service over its network during the market trial. According to SNET, it expects to begin a technical trial for telephony using the broadband facilities in the areas included in the video dialtone market trial during the third quarter of 1995.

On February 10, 1995, the Commission released a public notice describing the streamlined procedures that the Common Carrier Bureau will use to review the waivers and tariffs pertaining to video dialtone market trials that are filed by local exchange carriers. In accordance with those procedures, interested parties should combine their comments and/or replies regarding the Part 69 waiver request and Transmittal No. 641 into a single document. The discussion of the Part 69 waiver request should be separated from the discussion of the tariff revisions. Comments on SNET's Accounting and Cost Allocation plan should be filed separately, however. Comments in all the proceedings are due on or before **March 29, 1995**. Likewise, replies in all the proceedings are due on or before **April 7, 1995**.

Interested parties should file an original and four copies of all comments and reply comments with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. One copy of each pleading also must be sent to the Commission's contractor for public service records duplication, ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. In addition, one copy of all comments and reply comments on the Part 69 waiver request and SNET's Transmittal No. 641 should be sent to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Two copies of all comments and reply comments on SNET's Accounting and Cost Allocation plan should be sent to the Chief, Accounting and Audits Division, Room 812, 2000 L Street, N.W., Washington, D.C. 20554. Copies of the proposed tariff revisions and waiver requests can be obtained from ITS at (202) 857-3800.

The tariff proceeding, the Part 69 waiver proceeding, and the accounting and cost allocation proceeding will all be treated as non-restricted for purposes of the Commission's ex parte rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information regarding the Part 69 waiver request or SNET's Transmittal No. 641 contact David Krech, Tariff Division, Common Carrier Bureau, (202) 418-1530. For further information regarding SNET's Accounting and Cost Allocation plan contact Ken Ackerman, Accounting and Audits Division, Common Carrier Bureau, (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 10, 1995

Released: March 10, 1995

IN REPLY REFER TO: 1600E

Mr. Stuart F. Feldstein
Counsel for TMCT of Washington,
Pa., et al.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Feldstein:

In a March 2, 1995 letter, you advised the Commission that your client, TMCT of Washington, Pa. requests dismissal of its complaint in *TCMT of Washington, Pa., et al. v. Continental Telephone Company of Pa.*, PA 87-0010. In accordance with your letter, that complaint is hereby dismissed.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

CC: Contel Pa. dba GTE of Pennsylvania

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. Nos. 1 and 13	Transmittal Nos. 8173, 8174 8175 and 8176

ORDER

Adopted: March 9, 1995; Released: March 10, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On February 16, 1995, AT&T Corp. (AT&T) filed the above-referenced transmittals proposing amendments to various provisions in its tariffs. One portion of Transmittal No. 8173 was filed on 15 days' notice to increase rates for certain Area Code Calling Plan, Any Hour Saver Plan and Block-of-Time Calling Plan rate elements.[1] Transmittal No. 8174 raises rates for various international services, including calling card calls, operator assisted calls, international Dial Station calls, and various USADirect services, among other things. Transmittal No. 8175 introduces a Reach Out-World Special Weekends promotion and a Reach Out-World promotion. Transmittal No. 8176 increases the usage charges for International Dial Station rates for calls from Hawaii to certain overseas locations.

2. On February 27, 1995, Gerald Schwartz, an individual acting *pro se*, filed a petition to reject, suspend and investigate, AT&T Transmittal Nos. 8172[2] through 8176.[3] AT&T did not file a reply to the petition.

3. In its petition, Schwartz protests all of the rate increases contained in the above-referenced tariff transmittals on the grounds that: (1) AT&T is increasing these rates solely for the purpose of misleading the public relating to its real rate structure; (2) AT&T offsets its advertised discounts with rate increases; (3) AT&T's requests in these transmittals are meant to hamper competition by increasing rates so that AT&T can then offer "sham" discount programs; (4) AT&T's rate increase is excessive and unjustified; (5) AT&T's rate increase is unnecessary; (6) AT&T's rate increase is for the sole purpose of obtaining funds for deceptive advertising and to offset its discounts; and (7) AT&T's competition will be harmed because AT&T will be able to claim larger discounts when its net profit will remain unchanged.

4. Some of the domestic rate increases in Transmittal No. 8173 took effect on March 3, 1995. That portion of the transmittal was filed on 15 days' notice and, as to that portion of the transmittal, the petition would have been due on February 23, 1995. Schwartz's petition was, therefore, not timely filed as to this portion of this transmittal. The remainder of Transmittal No. 8173 and all of the other transmittals are scheduled to take effect on April 2, 1995.

5. The Tariff Division has reviewed AT&T Communications' Transmittal Nos. 8174 through 8176 and the related pleadings. We conclude that these filings do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject and suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal Nos. 8172, 8173, 8174, 8175 and 8176, filed by Gerald Schwartz, an individual, IS DENIED as to Transmittal Nos. 8174, 8175 and 8176, and DISMISSED as to the portion of Transmittal No. 8173 filed on 15 days' notice. We take no action at this time on Transmittal No. 8172 or on the portion of Transmittal No. 8173 that was filed on 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] On February 24, 1995, AT&T filed Transmittal No. 8208, which amended Transmittal No. 8173 by adding a rate schedule for the Commercial Area Code Calling Plan.

[2] Transmittal No. 8172 increases the per call rates for AT&T's domestic and international operator handled calls.

[3] The Tariff Division also received a letter from Keith Maydak, an individual, protesting AT&T's increases to its rates in Tariff F.C.C. No. 1, as contained in Transmittal Nos. 8172 through 8176. This letter merely asks the Commission to "review any and all AT&T rate increases prior to allowing the revised tariffs to go into efffect" and to "inquire into" alleged misleading activity with regard to the above-referenced transmittals. It does not request rejection, suspension or investigation as specified in Section 1.773(a) of the Commission's rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket Nos. 94-139 and 94-157

In the Matter of

Bell Atlantic Telephone Companies

Tariff F.C.C. No. 1, Transmittal No. 747

MEMORANDUM OPINION AND ORDER SUSPENDING RATES

Adopted: March 15, 1995; Released: March 15, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. On February 16, 1995, Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 747 to revise rates in its Tariff F.C.C No. 1 which became effective on February 11, 1995.[1] Bell Atlantic states that these revisions correspond to earlier revisions to its price cap indexes to reflect the recovery of exogenous amounts associated with the implementation of Statement of Financial Accounting Standard 106, "Employers Accounting for Postretirement Benefits Other Than Pensions" (SFA-106) and Statement of Financial Accounting Standard 112, "Standards for Employers' Accounting for Postemployment Benefits" (SFAS-112). MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 747 and Bell Atlantic filed a reply. In this Order, we suspend the Transmittal No. 747 revisions for one day and make these revisions subject to investigation in the above-captioned dockets.

II. BACKGROUND

2. On September 1, 1994, Bell Atlantic filed its Transmittal No. 690 to increase its interstate access rates based upon exogenous cost adjustments associated with its implementation of SFAS-106.[2] Bell Atlantic adjusted its price cap index (PCI) level upward to reflect the exogenous treatment for the costs of certain other post-employment benefits (OPEBs). The changes in OPEB costs for local exchange carriers (LECs) were implemented by the Common Carrier Bureau (Bureau) in 1993.[3] On December 29, 1994, the Bureau suspended Transmittal No. 690 for one day and initiated an investigation of the tariff in CC Docket No. 94-157.[4] On October 13, 1994, Bell Atlantic filed Transmittal No. 704 to increase rates based upon its SFAS-112 costs.[5] The Tariff Division suspended Transmittal No. 704 for one day and made the rates subject to our investigation in CC Docket No. 94-139.[6]

3. In a letter submitted to the Commission on February 14, 1995, two days prior to its filing of Transmittal No. 747, Bell Atlantic asserts that the revisions it was making in that transmittal reflect the recovery of its SFAS-106 and SFAS-112 exogenous amounts over a shorter period of time.[7] This shorter time period results because the effective dates of Transmittal Nos. 690 and 704 were deferred beyond the initial effective dates of those transmittals. In that letter, Bell Atlantic shows adjustments to its PCI to take into account SFAS-106 and SFAS-112 accounting changes. The transmittal before us here therefore raises the same issues as those already set for investigation in CC Docket Nos. 94-139 and 94-157.

III. POSITIONS OF THE PARTIES

4. On February 22, 1995, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Bell Atlantic Transmittal No. 747. In its petition, MCI argues that Bell Atlantic did not include the PCI adjustment required by Section 61.49(a) of the Commission's Rules, 47 C.F.R. § 61.49 (a) in its transmittal but instead in a letter submitted on February 14, 1995.[8] According to MCI, the LECs are required to file index information and the calculations underlying the index levels reflected in their transmittals.[9] MCI contends that Bell Atlantic's letter of February 14 is not subject to the same review process as a tariff. According to MCI, by failing to file the necessary information in its transmittal, Bell Atlantic is attempting to avoid the possibility that its transmittal adjusting the PCI would be suspended and investigated or rejected.[10] Finally, MCI con-

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[1] See Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 704, CC Docket No. 94-139, Memorandum Opinion and Order Suspending Rates (Tar. Div., Com. Car. Bur., rel. Feb. 9, 1995) (*SFAS-112 Suspension Order*).

[2] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690 (filed Sept. 1, 1994).

[3] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," CC Docket No. 92-101, 8 FCC Rcd 1024 (Com. Car. Bur. 1993) (*OPEB Order*).

[4] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690, NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328, Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1738, US West Communications, Transmittal No. 550, CC Docket No. 94-157, Memorandum Opinion and Order, DA 94-1613 (Com. Car. Bur., rel. Dec. 29, 1994) (*SFAS-106 Suspension Order*).

[5] *See* Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 704 (filed Oct. 13, 1994).

[6] *See SFAS-112 Suspension Order, supra* at note 1.

[7] *See* Letter from Michael R. McCullough, Bell Atlantic to Secretary, FCC, dated Feb. 14, 1995.

[8] MCI Petition at 4-8.

[9] *Id.* at 5.

[10] *Id.* at 8-9.

tends that the Bell Atlantic letter raises the same issues of lawfulness the Commission found in the *SFAS-112 Suspension Order*.[11]

5. In its reply, Bell Atlantic states that it complied with all of the filing requirements set out in the Commission's rules, but that MCI failed to follow Section 61.33(d) of the Commission's Rules, 47 C.F.R. § 61.33 (d). According to Bell Atlantic, that rule section requires petitions to be personally served on the filing carrier or sent via facsimile for tariff filings with notice periods of 15 days or less.[12] Finally, Bell Atlantic maintains that changes to the PCI can be made by letter and that this is an established practice of making changes when tariff revisions are not required.[13]

6. In addition, Bell Atlantic maintains that Transmittal No. 747 was merely a "true-up" to recover the exogenous costs associated with SFAS-106 and SFAS-112, which the Commission has already found may be included in a revised access tariff filing.[14] Bell Atlantic further states that it filed this transmittal because of delays in the effective dates of the original tariffs that reduced the amount of the exogenous costs that could have been recovered before the annual 1995 filing. Bell Atlantic maintains that this filing restores those amount by adjusting its rates to recover the same amount of revenue in the new shorter (four month) period of time.[15]

IV. DISCUSSION

7. As an initial matter, we conclude that Bell Atlantic complied with Section 61.49 (a) of the rules when it filed Transmittal No. 747 because that transmittal specifically references Bell Atlantic's February 14, 1995 letter which contained the cost support data necessary to comply with our rules. While under these circumstances the requirements of Section 61.49 (a) of the rules were met, we remind carriers to file all relevant cost support data with their transmittals to avoid any questions about their compliance with our rules.[16]

8. As indicated above, Bell Atlantic states in Transmittal No. 747 that it is proposing to revise its interstate access rates to reflect an adjustment of its exogenous costs for SFAS-106 and SFAS-112. According to Bell Atlantic, the exogenous costs for these postemployment benefits are the same as those requested in its Transmittal Nos. 690 and 704. These transmittals were suspended because Bell Atlantic's supporting information was "insufficient to answer basic questions."[17] While the Commission has granted exogenous treatment of these postemployment benefits, the question of the specific amount eligible for exogenous treatment is subject to investigation.[18] Transmittal No. 747 raises issues similar to those raised in the tariffs currently subject to investigation in CC Docket Nos. 94-157 and 94-139 and, therefore, we are suspending Transmittal No. 747 and including the issues presented therein in these two pending investigations.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revised rates set forth in Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 747 ARE SUSPENDED for one day from the current effective date and an investigation of those rates is included with CC Docket Nos. 94-157 and 94-139. Bell Atlantic SHALL FILE a supplement reflecting this suspension no later than five days from the release of this Order.

10. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204 (a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Bell Atlantic SHALL KEEP ACCURATE ACCOUNT of all amounts received that are associated with the rates that are the subject of this investigation.

11. IT IS FURTHER ORDERED that Bell Atlantic SHALL INCLUDE A STATEMENT in all subsequent transmittals revising rates indicating whether, and to what extent, the price change is predicated upon the exogenous cost claim set forth in Transmittal No. 747.[19]

12. IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Bell Atlantic Transmittal No. 747 filed by MCI Telecommunications Corporation IS GRANTED to the extent discussed above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[11] *Id.* at 11-12, citing *SFAS 112-Suspension Order, supra* at note 1. In its petition, MCI contends that Bell Atlantic unlawfully increased its Interconnection Charge by using calculations based on the wrong price cap indexes. *Id.* at 10-11. In a letter filed March 10, 1995, MCI withdrew this claim from its petition. Letter from Christopher Bennett, MCI, to Secretary, FCC, dated March 10, 1995.

[12] Bell Atlantic Reply at 1.

[13] *Id.* at 4.

[14] *Id.* at 2, *citing SFAS-106 Suspension Order*, supra at note 4 and *SFAS-112 Suspension Order*, supra at note 1.

[15] *Id.*

[16] We conclude Bell Atlantic is correct that MCI was required by the Commission's Rules to serve Bell Atlantic either personally or by facsimile with a copy of its petition. *See* Sections 61.33(d) and 1.773(a)(4) of the Commission's Rules, 47 C.F.R. §§ 61.33(d), 1.773 (a)(4). While we find that Bell Atlantic received a copy of MCI's petition in time to file a timely response and therefore was not prejudiced by MCI's action, we expect parties to fully comply with our rules regarding service of pleadings.

[17] *SFAS -112 Suspension Order, supra* at para. 12.

[18] *SFAS-106 Suspension Order, supra* at note 4; *SFAS-112 Suspension Order, supra*. at note 1.

[19] We anticipate that any such transmittals will be suspended for one day, included in this investigation, and made subject to an accounting order.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 3, 1995

Peninsula Wireless Communications
Petition For Declaratory Ruling

On December 23, 1994, Peninsula Wireless Communications (Peninsula) filed, pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, a petition for declaratory ruling. Peninsula requests that users of 11 GHz microwave-linked remote cellular equipment, to be manufactured and marketed by Peninsula, may construct and operate the equipment without having to request a waiver of the Part 21 loading rules, provided that such operation is on a secondary basis. Comments may be filed within thirty days of the date of this public notice; reply comments may be filed within twenty days thereafter. Copies of the petition, and comments when filed, may be inspected and copied at the FCC Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C., during the hours of 8:30 A.M. - 12:30 P.M. and 1:30 P.M. - 3:00 P.M., Mondays through Fridays. Such copies also may be purchased from the Commission's duplicating contractor, International Transcription Services, 2100 M St., N.W., Suite 140, Washington, D.C. 20037, Telephone No. (202) 857-3800.

For further information, telephone Robert James at (202)634-1763.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GVNW Inc./Management

Petition for Waiver of the
Commission's Rules To Establish
500 Access Service

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. In the summer of 1994, 12 local exchange carriers (LECs) filed petitions for waiver of Part 69 of the Commission's rules, 47 C.F.R. Part 69, to establish one or more new rate elements for 500 access service.[1] The Common Carrier Bureau (Bureau) granted those 12 waiver petitions on November 30, 1994.[2] On January 19, 1995, GVNW Inc./Management (GVNW) sought waiver of Sections 69.4(b) and 69.106 of the Commission's rules to establish 500 access service as well. No oppositions were filed in response to GVNW's waiver petition. For the reasons discussed below, we grant GVNW's waiver request.[3]

II. BACKGROUND AND SUMMARY OF PETITION

2. LECs provide 500 access service to access customers providing 500 service to end users. 500 service is a new "follow me" personal communications service which enables customers, among other things, to instruct their 500 service providers where to route their calls, whether to landline or cellular telephones, pagers, or to a voice messaging service.[4] In providing 500 access service, the LECs must screen the first six digits of the ten digit 500 number (*i.e.*, 500-NXX), in order to identify and route calls to the subscriber's designated 500 service provider.[5] There are two ways that a LEC can perform this six-digit screening and routing. First, the carrier can use switched-based translation, in which case it deploys a translation table contained in the software of the LEC switches, located at either the end office or the access tandem, to route the call to the subscriber's 500 service provider.[6] Alternatively, if the LEC's end office or access tandem has Advanced Intelligent Network (AIN) capability, the LEC launches a query to a centralized AIN database to identify the 500 service provider and routing.[7]

3. The Bureau did not impose a uniform rate structure for 500 access service on the LECs. It concluded that such a uniform rate structure would force some carriers into rate structures unrelated to the way they incur costs and might have delayed the availability of 500 service.[8] Accordingly, LECs were granted waivers to establish rate structures to recover the costs of providing 500 access service consistently with the way they incur those costs. Specifically, LECs planning to use switched-based translation were granted waivers to establish one or more non-recurring charges for 500 access service.[9] LECs planning to use AIN-based translation were permitted to establish recurring charges for their 500 accessservices, in addition to a small nonrecurring charge.[10] Similarly, LECs intending to use switched-based translation initially, but expected to convert to AIN some time in 1995, were granted waivers to establish recurring charges.[11] Finally, the Bureau declined to grant a blanket waiver, but stated that other LECs seeking a waiver that matched any of the waivers granted in the *500 Access Waiver Order* would warrant "expedited consideration."[12]

4. GVNW states that it plans to establish a nonrecurring charge (NRC) to be assessed on a per order, per end office basis.[13] GVNW claims that it has "good cause" for waiver within the meaning of *WAIT Radio*.[14] Finally, GVNW asserts that the proposed rate structure in its waiver request closely matches that of Ameritech and other LECs granted waiver in the *500 Access Waiver Order*.[15]

III. DISCUSSION

5. The Commission may exercise its discretion to waive a rule where there is "good cause" to do so,[16] because the particular facts would make strict compliance inconsistent

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[1] Ameritech Operating Companies, *et al.*, Petitions for Waiver of Sections 69.4(b) and 69.106 of Part 69 of the Commission's Rules, 9 FCC Rcd 7873 (Com. Car. Bur., 1994) (*500 Access Waiver Order*).

[2] *Id.*

[3] Concurrently with its waiver request, GVNW filed Transmittal No. 114 to provide 500 access service. GVNW filed an amendment to that transmittal on February 1, 1995. GVNW's tariff filing is unopposed. Generally, any tariff filing which would establish a rate element inconsistent with Part 69 is patently unlawful, and therefore subject to rejection unless and until a petition for waiver has been granted. *See* US West Communications, Inc., Revisions to Tariff F.C.C. No. 5, 9 FCC Rcd 5228 (Com. Car. Bur. 1994). In this case, however, the Bureau has specifically permitted LECs to file their 500 service-related waiver requests and tariffs simultaneously. *500 Access Waiver Order*, 9 FCC Rcd 7878-79 (para. 31). Accordingly, we will not reject Transmittal No. 114 on this basis.

[4] *Id.* at 7873 (paras. 2-3).

[5] *Id.* at 7873 (para. 3). The 500 service provider, using database technology, will then route the call to the phone or other device designated by the 500 service subscriber. *Id.*

[6] *Id.* at 7873 (para. 4).

[7] *Id.*

[8] *Id.* at 7878 (para. 27).

[9] *Id.* at 7878 (para. 29).

[10] *Id.* at 7878 (para. 28).

[11] *Id.* at 7878 (para. 30).

[12] *Id.* at 7878-79 (para. 31).

[13] GVNW Waiver Petition at 1.

[14] *Id.* at 1-2, *citing* WAIT Radio v. F.C.C., 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*).

[15] *Id.* at 2-3.

[16] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

with the public interest.[17] Further, the Commission's grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[18] We conclude that the waiver GVNW seeks here is substantially similar to the waivers granted in the *500 Access Waiver Order* to establish nonrecurring charges for 500 access service.[19] Therefore, we find that GVNW has shown good cause for the waiver it seeks.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for waiver filed by GVNW Inc./Management IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[17] *WAIT Radio*, 418 F.2d at 1159.
[18] Northeast Cellular Telephone Co. v. F.C.C., 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[19] *See 500 Access Waiver Order*, 9 FCC Rcd at 7878 (para. 28).

Before the
Federal Communications Commission
Washington, D.C. 20554

IC Docket No. 94-31

In the Matter of

Preparation for International
Telecommunication Union World
Radiocommunication Conferences

ORDER

Adopted: March 3, 1995: Released: March 6, 1995

By the Chief, International Bureau:

1. COMSAT Corporation's COMSAT Mobile Communications Division (COMSAT) requests that the time for filing reply comments to the *Second Notice of Inquiry* [1] in this proceeding be extended from March 21, 1995, to April 14, 1995. COMSAT represents that its request is supported by American Mobile Satellite Corporation, Iridium, Inc., Loral/Qualcomm Partnership, L.P., and TRW, Inc.

2. This proceeding seeks comment on a broad range of complex and technical issues to assist the Commission in preparing draft U.S. proposals for the World Radiocommunication Conference (WRC-95) to be convened by the International Telecommunication Union (ITU) in Geneva, Switzerland from October 23 to November 17, 1995. The FCC draft U.S. proposals resulting from this proceeding will be considered by the Departments of State and Commerce in forging final U.S. proposals for WRC-95. Final U.S. proposals must be transmitted to the ITU by June 23, 1995.

3. In its request, COMSAT states that it and many other interested parties are now actively participating in preparations for two international meetings taking place later this month relating to WRC preparations; in the Commission's WRC-95 Industry Advisory Committee (IAC); and in preparing comments to the Commission's 2 GHz allocation proceeding.[2] COMSAT asserts that in view of these activities, and because of the complex nature and significance of the issues posed in the *Second Notice of Inquiry*, the March 21st deadline does not allow sufficient time for full development of reply comments. In particular, COMSAT notes that it and others are engaged in the U.S. preparations for the Conference Preparatory Meeting (CPM) for WRC-95 that will occur in Geneva from March 22 to April 5, 1995. The CPM will complete a Report to WRC-95 containing technical, operational, and regulatory/procedural information on the WRC-95 agenda items. COMSAT contends that postponing the reply comment deadline until after the CPM's conclusion would enable the parties to incorporate the results of that meeting into their reply comments thereby making them more informative and valuable to the Commission. Finally, COMSAT recognizes that the Commission is under extreme time constraints to draft U.S. proposals in time for negotiation with other government entities. It avers that the requested extension will not disrupt this process nor the IAC's completion of its Final Report due to the Commission on May 1, 1995.

4. Although the Bureau does not routinely grant extension requests, we find that an extension of the reply comment deadline to April 14, 1995 would be beneficial in this proceeding as it would enable the parties to include valuable and potentially critical information learned at the CPM. We ask the parties participating in the CPM to incorporate the results of the meeting into their reply comments and to include, where possible, their views on the likely success of potential U.S. proposals at WRC-95 and where known, the views of foreign delegations. The parties should note, however, that the Bureau remains committed to complete this proceeding on a timely basis and that no further extensions are contemplated.

5. Accordingly, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, IT IS ORDERED THAT the deadline for filing reply comments in response to the *Second Notice of Inquiry* IS EXTENDED to April 14, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[1] *Second Notice of Inquiry* in IC Docket No. 94-31, 60 Fed. Reg. 8894 (Feb. 16, 1995).
[2] *Notice of Proposed Rule Making* in ET Docket No. 95-18, 60 Fed Reg. 11,644 (Mar. 2, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 7, 1995

PETITION FOR RECONSIDERATION OF ACTION IN RULEMAKING PROCEEDING

A petition for reconsideration has been filed in the Commission rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor ITS, Inc. (202) 857-3800. Opposition to this petition must be filed within [15 days] of the date of public notice of the petition in the Federal Register. See Section 1.4(b) (1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

SUBJECT: In the Matter of Authority to Issue Subpoenas (FCC 94-319)

FILED BY: Mark J. Golden, Vice President of The Personal Communications Industry Association on 01-26-95

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 9, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S PETITION FOR WAIVER OF CERTAIN OPEN NETWORK ARCHITECTURE REQUIREMENTS

On March 2, 1995, the GTE Telephone Operating Companies and GTE System Telephone Companies (GTE) filed a petition seeking a waiver of certain Open Network Architecture (ONA) filing requirements. Pursuant to the *GTE ONA Order*, 9 FCC Rcd 4922 (1994), the Commission required that GTE file an ONA plan, file federal and state ONA tariffs, and implement ONA requirements and nondiscrimination safeguards. GTE filed its ONA Plan on January 4, 1995, and it is scheduled to file its ONA tariffs on April 4, 1995.

In its waiver petition, GTE proposes to file its interstate ONA tariffs thirty days after its 1995 Annual Access filings become effective. GTE states that the interstate ONA tariffs and the Annual Access filings are due almost simultaneously, and that the timing of these two filings will cause administrative and technical difficulties for GTE. GTE argues that by postponing the filing date for its interstate ONA tariffs, GTE will be able to use the end office switching revenues from the annual filing as a starting point for developing the ONA rates. GTE adds that the Commission is considering changes in the Price Cap rules that will likely require changes to its Annual Access tariff filings and its ONA tariff filings.

GTE also seeks a waiver of the ONA requirement for filing the semiannual tariff report. GTE proposes to file its semiannual tariff report on March 30, 1996 instead of September 30, 1995.

In its waiver request GTE states that it seeks a waiver to defer the ONA implementation date of July 5, 1995, until three months after the ONA tariffs are filed. On March 6, 1995, however, GTE filed an *ex parte* clarifying its waiver request. In the *ex parte* letter GTE clarifies that in its waiver request it is seeking a waiver of only the requirements regarding the interstate tariffs filing date and the September 30, 1995 tariff report filing date. GTE states that if the waiver is granted, it plans to comply with the remaining ONA requirements and nondiscrimination safeguards according to the schedule established in the *GTE ONA Order*. GTE also clarifies that it is already providing several interstate ONA services on an unbundled basis. In a separate, previously filed waiver request GTE has sought an extension of the intrastate tariffs filing date.

Interested parties should file comments on GTE's waiver request by **March 20, 1995**, and reply comments by **March 29, 1995**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the waiver request can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1995

BELLSOUTH PETITIONS FOR PART 69 OF THE COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: March 27, 1995
REPLY COMMENTS: April 3, 1995

On February 27, 1995, BellSouth Telecommunications, Inc. (BellSouth) petitioned the Commission for waiver of Part 69 of the Commission's rules to establish new rate elements under the Information category for "Direct Access to Directory Assistance Service" (DADAS). BellSouth asserts that DADAS will provide current directory assistance access customers an alternative to traditional service. BellSouth states that DADAS will permit direct customer access to the BellSouth subscriber database. According to BellSouth, using DADAS and their own directory assistance operators, customers will have the ability to serve the end user directly. It asserts that the proposed offering will satisfy customer requirements for rapid response, system reliability, and redundancy.

BellSouth proposes the following rate elements to recover the costs of provisioning DADAS: (1) DADAS Database Service Charge element; (2) DADAS Per Query Charge element; and (3) DADAS Service Establishment Charge element.

Interested parties may file comments on BellSouth's petition no later than **March 27, 1995**. Replies should be filed by **April 3, 1995**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Service (ITS), the Commission's duplicating contractor, at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris at (202)418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic	Transmittal No. 741
Telephone Companies	No. 756
Tariff F.C.C. No. 10	

Channel Reservation Deposit

ORDER

Adopted: March 10, 1995; Released: March 10, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On January 27, 1995, Bell Atlantic filed Transmittal No. 741 to provide video dialtone service in Dover, New Jersey.[1] Transmittal No. 741 has two sections. The first section introduces the Channel Reservation Deposit (CRD), and the second proposes rates, terms, and regulations for the provision of video dialtone service in Dover. This Order only deals with the Channel Reservation Deposit.[2]

2. Petitions to reject or, in the alternative, suspend and investigate were filed against the Channel Reservation Deposit portion of Transmittal No. 741 by: the Atlantic Cable Coalition (ACC); AT&T Corporation; Cablevision Systems Corporation;[3] Adelphia Communications Corporation, Comcast Cable Communications, Inc., Cox Enterprises, Inc., and Jones Intercable, Inc. (Joint Petitioners); and, the National Cable Television Association (NCTA). Bell Atlantic filed Transmittal No. 756 on March 10, 1995 to reissue and revise the Channel Reservation Deposit section of Transmittal No.741.[4]

3. The CRD allows prospective video dialtone programmer-customers (PCs) to reserve channel capacity on Bell Atlantic's video dialtone system in Dover. The CRD is a per channel deposit of $1,800 that will be credited towards the PC's nonrecurring and monthly charges for video dialtone service until the balance is depleted. The tariff contains an allocation plan if demand for channels exceeds the channel capacity of the system. The tariff also specifies certain situations in which PCs will be able to request a full or partial refund of the CRD. The CRD will be accepted during an enrollment period prior to the effective date of the video dialtone service tariff. The enrollment period for Dover will be March 13, 1995 through April 10, 1995.

4. Petitioners argue that the CRD should not be considered separately from the video dialtone service tariff since the deposit amount is based on two months service using a rate and a rate structure which have not yet been approved.[5] The petitioners also complain that the tariff is overly broad because the provisions could apply to all of Bell Atlantic's service areas, even though Bell Atlantic only has authority to provide service in Dover.[6] ACC contends that the channel allocation plan is discriminatory since Bell Atlantic intends to exempt FutureVision.[7] Joint Petitioners also complain that the tariff does not limit the number of channels any single PC can obtain, and does not prevent "warehousing" of channels.[8] NCTA and Cablevision also contend that the enrollment period should be longer.[9] They also argue that PCs should be able to withdraw their channel request if there is any increase in the effective tariff rates from the proposed rates, not just when such increases are more than 10 percent.[10]

5. In its reply, Bell Atlantic argues that the CRD does not involve a new service or new rate element, and thus does not require a Part 69 waiver.[11] It notes that in other proceedings, the Commission has authorized it to collect deposits which were calculated on the same basis as the CRD.[12] Bell Atlantic argues that its Section 214 authorization affirmed the reasonableness of its agreement with FutureVision, and found that even setting aside those channels the system would have sufficient capacity for other PCs.[13] It notes that it has voluntarily placed a 50 percent limit on the amount of capacity any single PC may purchase during the first year of video dialtone service.[14] It argues that the CRD prevents "warehousing" because the tariff requires PCs to make advance payments for channels and also requires billing to start for those PCs which have not begun service either nine months after they receive notice of final channel capacity allocations or 90 days after effective date of the service tariff, whichever is later.[15] Bell Atlantic argues that its four-week enrollment period balances the needs of PCs to make their business decisions and the need to conclude the process in a timely fashion, and that this period is well within the range of enrollment dates the Commission has previously approved.[16] Bell At-

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[1] Bell Atlantic has received Section 214 authorization to provide video dialtone service in Dover, New Jersey. New Jersey Bell Telephone Company, File No. W-P-C 6840, 9 FCC Rcd 3677 (1994) (*Dover 214 Order*).

[2] Before providing video dialtone service in Dover, Bell Atlantic must receive a Part 69 waiver for the rate elements it proposes to use, and the video dialtone service portion of Transmittal No. 741 must take effect. Bell Atlantic's Part 69 waiver is currently pending. Bell Atlantic, Waiver of Section 69.106 of the Commission's Rules to Offer Video Dialtone Service, DA-1345 (filed Nov. 29, 1994; amendment filed Jan. 27, 1995).

[3] Cablevision filed a motion to accept its petition out of time. Bell Atlantic did not object to this motion. We find that Cablevision's one day delay in filing its petition did not prejudice Bell Atlantic in its preparation of its reply comments, and thus Cablevision's motion is granted.

[4] Transmittal No. 756 was filed pursuant to Special Permission No. 95-276, issued March 9, 1995.

[5] *See, e.g.*, AT&T Petition at 3; Joint Petition at 3, 7-8.

[6] *See, e.g.*, ACC Petition at 3,6; Cablevision Petition at 15-16.

[7] ACC Petition at 8-10.

[8] Joint Petition at 13, 16.

[9] Cablevision Petition at 11-13; NCTA Petition at 6 n.12.

[10] Cablevision Petition at 14; NCTA Petition at 2 n.2.

[11] Bell Atlantic Reply at 3.

[12] *Id.* at 3-4.

[13] *Id.* at 7-8 *citing Dover 214 Order*, 9 FCC Rcd at 3677, ¶ ¶ 15, 17.

[14] *Id.* at 2, 7.

[15] *Id.* at 8-9.

[16] *Id.* at 11 n.28 *citing* BellSouth Telecommunications, Inc, File No. W-P-C 6977, DA 95-181 (Com. Car. Bur. rel. Feb. 8, 1995).

lantic also argues that allowing a PC to withdraw its channel reservation based on *de minimis* changes in rates would provide incentives for PCs to reserve as much capacity as possible. It further argues that since the CRD is an advance payment, PCs suffer no financial harm due to *de minimis* changes in the rates.[17]

6. According to Bell Atlantic, Transmittal No. 756 revises the CRD to provide more clarity. The revised language lists only Bell Atlantic-New Jersey as the issuing carrier and specifies that video dialtone service is currently available only in Dover. It states that the CRD is $1.800 per channel. It also states that during the initial enrollment period no PC may request more than 50 percent of the system's capacity. It clarifies that the CRD will be refunded in full or in part if the rates on the initial date the video dialtone service tariff becomes effective, increases a PC's bill by more than 5 percent. Transmittal No. 756 also defers the effective date of the channel allocation provisions of the tariff until April 19, 1995.

7. We have reviewed the channel reservation portion of Bell Atlantic's Transmittal No. 741 and Transmittal No. 756, the petitions filed by ACC, AT&T, Cablevision, Joint Petitioners and NCTA, and all associated pleadings. We conclude that the provisions of Transmittals Nos. 741 and 756 which take effect on March 13, 1995 are not patently unlawful so as to warrant rejection and the petitioners have not raised any issue that warrants suspension and investigation of Bell Atlantic's channel reservation deposit at this time.

8. Accordingly, IT IS ORDERED THAT the petitions for suspension and investigation or rejections filed by the Atlantic Cable Coalition; AT&T Corporation; Cablevision Systems Corporation; Adelphia Communications Corporation, Comcast Cable Communications, Inc., Cox Enterprises, Inc., and Jones Intercable, Inc.; and, the National Cable Television Association, against Bell Atlantic Telephone Companies, Transmittal No. 741 -- Channel Reservation Deposit, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[17] Bell Atlantic Reply at 6 n.14.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 9, 1995

US WEST, INC. FILES REVISION TO ITS COST ALLOCATION MANUAL TO UTILIZE A STATISTICAL SAMPLING SYSTEM FOR CERTAIN TECHNICIAN GROUPS TIME REPORTING

PUBLIC COMMENT INVITED

On May 1, 1995, US West, Inc. filed revisions to its Cost Allocation Manual (CAM) to reflect changes in the time reporting procedures for its telephone subsidiary, US West Communications, Inc. Specifically, US West Communications proposes to utilize a statistical sampling process for technician time reporting. The statistical sampling process which US West Communications calls the Sampled and Verified Employee Reporting (SAVER) Process is to be effective July 1, 1995, and if approved, will replace the current process by which technicians report their daily work activities. Under SAVER, only the technicians selected by random sampling will report their daily work activities by time reporting.

Parties may file comments on US West Communications' proposed change to its CAM on the statistical time reporting procedure by **June 5, 1995**. Replies should be filed by **June 20, 1995**. Comments should reference AAD 95-64. A copy of each pleading should be sent to Kim Yee, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Kim Yee at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 9, 1995

Temporary Closing of Public Reference Room
in Accounting and Audits Division
of the Common Carrier Bureau
at 2000 L Street, N.W. Room 812, Washington D.C.

Notice is hereby given that the public reference room located at 2000 L Street, N.W. Room 812, Washington, D.C. will be temporarily closed between May 1, 1995 and May 15, 1995 due to the construction of new offices. All materials in the public reference room will be put in storage during construction. Any request for information should be held off until after May 15, 1995. We apologize for any inconvenience this may have caused.

For further information contact Sherice Reams at (202) 418-0800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-135

In the Matter of

Amendment of Section 73.202(b), RM-8541
Table of Allotments,
FM Broadcast Stations.
(Atkins, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1995; Released: May 9, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 9 FCC Rcd 6828 (1994) ("*Notice*"), issued in response to a petition filed on behalf of Atkins Broadcasting ("petitioner") proposing the allotment of FM Channel 257A to Atkins, Arkansas, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. Supporting comments were also filed by Richardson Broadcasting. No other comments were received

2. In light of the interest expressed in providing a first local aural transmission service to Atkins, Arkansas, we will allot Channel 257A to that community, as requested.

3. As stated in the *Notice*, Channel 257A can be allotted to Atkins consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter therefor is located at least 5.0 kilometers (3.1 miles) east of the community at coordinates 35-14-49 and 92-52-53. The site restriction is necessary to avoid a short-spacing to the licensed site of Station KMAG(FM), Channel 256C, Fort Smith, Arkansas, at coordinates 35-04-26 and 94-40-48.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Atkins, Arkansas, as follows:

City	Channel No.
Atkins, Arkansas	257A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 257A at Atkins, Arkansas, will open on **June 23, 1995** and close on **July 24, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 257A at Atkins, Arkansas, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-224

In the Matter of

Amendment of Section 73.202(b),	RM-8291
Table of Allotments,	RM-8325
FM Broadcast Stations.	RM-8358
(Bismarck, Centreville, Farmington,	RM-8360
Ironton, Missouri and	
Herrin, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1995; Released: May 9, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5203 (1993), issued in response to a petition filed by KREI, Inc. ("KREI"), proposing the allotment of Channel 258C3 to Farmington, Missouri, as that community's second FM broadcast service. MKS Broadcasting, Inc. ("MKS") filed comments supporting an allotment at Farmington, indicating it will file an application for Channel 258C3. Counterproposals were filed by Wayne E. Tate ("Tate"), KREI, and Wayne E. Tate and David E. Smith Communications, Inc. ("Tate and Smith").[2] Tate and Smith and KREI filed reply comments. On July 20, 1994, David E. Smith Communications, Inc. withdrew the portion of its counterproposal which requested the allotment of Channel 224A to Centreville, Missouri.[3] A motion for leave to file statement and statement were filed by KREI after the record closed.[4]

2. Tate counterproposed the substitution of Channel 224B1 for Channel 224A at Herrin, Illinois, and modification of the license for Station WVZA to specify operation on Channel 224B1. To accommodate the upgrade at Herrin, Tate also requested the substitution of Channel 258A for Channel 224A at Ironton, Missouri, and modification of the license for Station KYLS. Tate acknowledged his obligation to the licensee at Ironton pursuant to *Circleville, Ohio*, 8 FCC 2d 159 (1967). In support of the counterproposal, Tate states that the upgrade at Herrin will increase the area covered by approximately 95 percent and will result in a 36 percent increase in population served from 129,257 to 176,133 and will clearly be in the public interest. Also, Station KYLS, Ironton, operates with 0.64 kilowatts of power at a height of 204 meters above average terrain which is approximately equivalent to three kilowatts at 100 meters HAAT. According to Tate, the proposed substitution at Ironton will permit full six kilowatt operation by Station KYLS.

3. The counterproposal filed by KREI proposes to allot Channel 258C3 to Bismarck, Missouri, in lieu of Farmington. KREI states that Bismarck is an incorporated community with a population of 1,579 (1990 Census), with its own city council and elected mayor. Bismarck operates a police department, fire department and its own schools. Further, there are a variety of businesses and professions which identify themselves with Bismarck. KREI notes that the community of Bismarck observed its 125th anniversary in July, 1993. KREI maintains that the allotment at Bismarck will provide a first aural service which is superior to the allotment of a third aural service at Farmington. KREI states that it will file an application for Channel 258C3 at Bismarck.

4. Tate and Smith submitted a joint counterproposal requesting the substitution of Channel 258C3 for Channel 224A at Ironton, Missouri, and modification of the license for Station KYLS, substitution of Channel 224B1 for Channel 224A at Herrin, Illinois, and modification of the license for Station WVZA. Smith, licensee of Station KYLS, Ironton, has consented to Tate's proposed substitution of channels at Ironton but requests the new channel be allotted as a class C3 rather than a Class A channel.

5. KREI filed reply comments stating that the public interest will be served by the allotment of Channel 258C3 at Bismarck, Missouri. The allotment will provide Bismarck with its first aural transmission service. KREI provided information to support Bismarck's status as a community for allotment purposes. KREI contends that Bismarck has a greater need for a new service than does Farmington as Farmington is currently served by two commercial FM stations. Finally, the Class C3 allotment at Bismarck is comparatively superior to the B1 and C3 upgrades at Herrin and Ironton. Neither upgrade will provide service to a white or grey area, and for this reason, the provision of a first aural transmission service at Bismarck is comparatively superior under Section 307(b) of the Communications Act.

6. Tate and Smith submitted joint comments on the counterproposals filed in this proceeding. Tate and Smith argue that the upgrade proposals for Ironton and Herrin better serve the public interest than KREI's allotment to a single community--Bismarck, Missouri. While a first local service would be brought to Bismarck, the community is located in St. Francis County, which is already served by radio stations at Farmington and Flat River. Tate and Smith contend that their proposal for Herrin will result in an increase in population covered from 129,257 to 176,133

[1] The communities of Herrin, Illinois, Ironton, Bismarck and Centreville, Missouri, have been added to the caption.

[2] The counterproposals were put on public notice on October 22, 1993 (Report No. 1978).

[3] In accordance with Section 1.420(j) of the Commission's Rules, David E. Smith Communications, Inc. states that it has not received consideration of any type for withdrawal of that portion of its counterproposal supporting the allotment of an FM channel at Centreville, Missouri. No further consideration will be given to an allotment at Centreville, Missouri, since the proposal has been withdrawn.

[4] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's rules, we shall not accept the unauthorized pleadings.

and the upgrade at Ironton will provide an increase from 12,249 people to 59,228 people. Tate and Smith believe that the increased population served by the two upgrades outweigh the new service proposed by KREI at Bismarck. Tate and Smith, therefore, request that the Commission grant the allotment of Channel 224B1 at Herrin and Channel 258C3 at Ironton.

7. A review of the proposals indicates that Bismarck, Farmington, Ironton, Missouri and Herrin, Illinois, are all deserving of new or expanded service. In an effort to provide each community with new or expanded service, the staff performed a search to determine if alternate channels were available. The study indicates that there are no alternate channels available to resolve the conflicts. Our decision is therefore guided by the allotment priorities as set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). These priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)]. The proposal for Herrin, Illinois, substitutes Channel 224B1 for Channel 224A.[5] The upgrade at Herrin requires the substitution of Channel 258A or Channel 258C3 for Channel 224A at Ironton, Missouri. Expanded service would be provided to Herrin and Ironton. The proposal will not provide a first local service to either community and Tate and Smith did not make a showing that either channel would provide any first or second full-time aural service. The proposal to add Channel 258C3 to Farmington, Missouri, would provide a second local FM service to the community. The proposal to add Channel 258C3 at Bismarck will provide a first local service to the community fulfilling priority (3). The proposals for Herrin, Ironton and Farmington would be compared under priority (4) - Other public interest factors. However, since the proposal for Bismarck will fulfill priority (3) - First local service, we will allot Channel 258C3 to Bismarck. The Commission usually favors a new service over an upgrading of an existing service. *See Benton, Arkansas, et al.*, 2 FCC rcd 1963 (1982) and 3 FCC Rcd 4840 (1988).

8. Channel 258C3 can be allotted to Bismarck, Missouri, in compliance with the Commission's spacing requirements provided there is a site restriction 15.3 kilometers (9.5 miles) southeast of the community.[6] The site restriction will prevent a short spacing to Station KFUD-FM, Channel 256C, Clayton, Missouri, Station KZYQ-FM, Channel 259C3, St. James, Missouri, and Station KDJR, Channel 261A, De Soto, Missouri.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bismarck, Missouri	258C3

10. The window period for filling applications for Channel 258C3 at Bismarck, Missouri, will open on **June 23, 1995**, and close on **July 24, 1995**.

11. IT IS FURTHER ORDERED, That the petition filed by KREI, Inc. (RM-8291) IS DISMISSED.

12. IT IS FURTHER ORDERED, That the counterproposal filed by Wayne E. Tate (RM-8325) IS DISMISSED.

13. IT IS FURTHER ORDERED, That the counterproposal filed by Wayne E. Tate and David E. Smith Communications, Inc. (RM-8360) IS DISMISSED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[5] Wayne E. Tate, licensee of Station WVZA, Herrin, Illinois, has filed an application in accordance with the Commission's "one-step" procedures to change its channel from 224A to Channel 224B1 (BPH-931230IB). David E. Smith, licensee of Station KYLS, Ironton, Missouri, has filed an application in accordance with the Commission's "one-step" procedures to change its channel from 224A to Channel 225A (BPH-931230IE). The applications were filed simultaneously as the substitution at Ironton will accommodate the upgrade at Herrin.

[6] The coordinates for Channel 258C3 at Bismarck are 37-38-43 and 90-32-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rangemaster Golf Enterprises dba
ProShot Golf

Request For Waiver of the Rules to
Obtain Permanent Licenses For Its Local
Area Position Determination System
Under Part 90.

ORDER

Adopted: April 7, 1995; Released: May 9, 1995

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Rangemaster Golf Enterprises, dba ProShot Golf (Rangemaster) has requested rule waivers necessary to obtain permanent licenses for its local area position determination system (system) at La Quinta, California (La Quinta). Rangemaster also seeks a blanket waiver applicable to its future license applications for its system at other locations. For the reasons discussed below, we are denying its request for blanket authority. We are granting, however, Rangemaster's request for waivers for its system at La Quinta.

II. BACKGROUND

2. Rangemaster has been operating its system at a La Quinta golf course under developmental authority.[1] Within its service area, the system provides golfers with location information on the course. It determines location from the phase relationships among signals as received at a golf cart from multiple (four to six) fixed, low-power transmitters. The transmissions utilize emission type[2] having an effective bandwidth of approximately 70 Hz. Each transmitter produces two watts output power on frequencies offset between existing channels at 28-50 MHz in the Business Radio Service. Each transmitting antenna is no more than twenty feet above ground or existing manmade structure. According to Rangemaster, it has neither detected nor been informed of any interference from the system.

3. Rangemaster states that scientific and surveying applications are also a viable market for its position locating technology. Applications for the mapping of radioactive surface contamination for precise location, identification and removal of contaminated material and the precision mapping of artifacts at archaeological excavation sites are also being evaluated and tested by Rangemaster.

III. DISCUSSION

A. Waivers to Provide Local Area Determination Services

4. Rangemaster seeks waivers of various rule sections to permit licensing of its system. It asks that Section 90.75 of the Commission's Rules, 47 C.F.R. § 90.75, be waived to permit fixed station transmissions of very narrowband signals centered on frequencies offset from regularly assignable channels in the 28-50 MHz band of the Business Radio Service.[3] It also requests waiver of Section 90.207 of the Commission's Rules, 47 C.F.R. § 90.207, in order to transmit with emission type N0/N.[4] It further requests waiver of Section 90.403(f) of the Commission's Rules, 47 C.F.R. § 90.403(f), to permit continuous transmissions.[5] It requests waiver of Section 90.425 of the Commission's Rules, 47 C.F.R. § 90.425, to transmit signals without station identification.[6] Finally, it requests waiver of any other rule sections that must be waived to permit authorization of the system.

5. The system utilizes very low transmitter power and very low antenna heights. The transmitted signal has an extremely narrow bandwidth that can, apparently, be transmitted on frequencies centered between channels in the Business Radio Service without causing interference to other users of the spectrum. Operation of the system relies upon continuous transmissions for location-determining purposes. Station identification is impractical because an unmodulated signal contains no information.

6. We conclude that good cause exists to waive Sections 90.75, 90.207, 90.403(f) and 90.425 as requested to permit continued operation of the system at La Quinta in the Business Radio Service using up to six offset channels at 29.7 - 50 MHz[7] provided that it causes no interference to other stations licensed for operation in this band. Rangemaster has shown that unique circumstances are involved in this particular case and that no reasonable alternative solutions exist within the rules. It has demonstrated through use of developmental licenses that its system is viable and that it does not cause harmful interference at La Quinta.

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[1] The results of the developmental program are described in detail in the reports filed by Rangemaster in connection with the renewal applications for its developmental authorizations. *See, e.g.*, File nos. 9106030934, 9201048706.

[2] A type N0/N emission in an unmodulated carrier wave containing no information.

[3] Offset operation is currently permitted only in the 450-470 MHz band. *See* Section 90.267 of the Commission's Rules, 47 C.F.R. § 90.267.

[4] Normally operations authorized in the Business Radio Service are intended to provide voice and data communications between stations.

[5] Stations in the Business Radio Service are prohibited generally from transmitting continuously an unmodulated carrier signal.

[6] A station is required to transmit its assigned call sign on its transmitting channel periodically for the purpose of making known clearly, the source of the transmission from the station to those receiving the transmissions.

[7] Only certain segments of the band 28-50 MHz are available to the private land mobile services. The band 28.0-29.7 MHz, for instance, is allocated exclusively to the amateur and amateur-satellite services.

B. Blanket Waiver Request

7. Rangemaster has also requested that it be granted a blanket waiver, applicable to all sites it may desire to provide local area location determination service. It asserts that grant of a blanket waiver is appropriate in that it will promote administrative efficiency and reduce Commission burdens without creating any meaningful risk to the public. The granting of a blanket waiver or additional waivers for each future sites Rangemaster selects, however, goes beyond the scope of the waiver process. We fully recognize that the public interest, convenience and necessity favor a regulatory approach that encourages endeavors such as Rangemaster's when they lead to the development and implementation of unique and spectrally-efficient communication systems. It is, however, also in the public interest that a notice and comment rule making proceeding be instituted as required by the Administrative Procedure Act, 5 U.S.C. § 553. The appropriate course for Rangemaster is to file a petition for rule making to provide for the operation of such systems throughout the nation.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that, under the authority contained in Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, and pursuant to the authority of Sections 4(i) and 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303(g), and Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151, the request for waiver of Sections 90.75, 90.207, 90.403(f) and 90.425 of the Commission's Rules, 47 C.F.R. §§ 90.75, 90.207, 90.403(f), and 90.425, to operate its system at La Quinta, California, filed by Rangemaster Golf Enterprises dba ProShot Golf on April 12, 1994, is GRANTED. This waiver is granted subject to not causing any interference to other Business Radio Service stations using Business Radio Service frequencies, and may be terminated by the Commission at any time if, at its discretion, the need for such action arises.

9. IT IS FURTHER ORDERED that, under the authority contained in Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, and pursuant to the authority of Sections 4(i) and 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303(g), and Section 90.151 of the Commission's Rules, 47 C.F.R. §§ 90.151, the request for blanket waiver authority filed by Rangemaster Golf Enterprises dba ProShot Golf on April 12, 1994, is DENIED.

10. For further information regarding this *Order* contact the Private Wireless Division, (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-274

In the Matter of

Amendment of Section 73.202(b), RM-8372
Table of Allotments,
FM Broadcast Stations.
(Ely, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1995; Released: May 9, 1995

By the Chief, Allocations Branch:

1. At the request of Keith E. Lamonica ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7910 (1993), proposing the allotment of Channel 243A to Ely, Nevada, as the community's third local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. Comments in opposition were filed by Stubbs Broadcasting Company, Inc. ("SBC"), to which petitioner responded.[1]

2. SBC, licensee of Station KDSS(FM), Channel 224C3, Ely, opposes the allotment of Channel 243A on economic grounds. SBC states that prior to the abolition of population guidelines as concerns the allotment of FM channels, communities with a population of under 50,000 were provided with one or two channels.[2] While recognizing that these guidelines were instituted to prevent larger cities from obtaining a disproportionate share of the channels, SBC submits that smaller communities were also prevented from having so many stations that the economic viability of the existing stations were threatened. It states that Ely is a small community, with a 1990 U.S. Census population of 4,756 persons, located in White Pine County, which has a population of 9,264 persons. SBC contends that Ely is struggling economically because of employee layoffs at the Magma Nevada Mining Company's Robinson Project and the delay in construction of a copper concentrator in the area. Because of this economic situation, SBC believes that the allotment of a fourth local aural transmission service will only result in forcing one or more of Ely's existing stations to go off the air. Thus, it believes that the Commission should not continue to allot channels based solely on technical feasibility without regard to the impact on the continuing viability of existing stations. Further, it contends that Ely is already well served with one commercial AM and two commercial FM stations.

DISCUSSION

3. We believe that the allotment of Channel 243A to Ely will serve the public interest since it will provide the community with an additional local transmission service. In regard to SBC's economic concerns, the Commission has already determined that such issues are not relevant in either a licensing or allotment context. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989); *Cheyenne, Wyoming*, 8 FCC Rcd 4473 (1993); *Albion, Nebraska*, MM Docket 94-143, released March 21, 1995 (DA 95-474), 10 FCC Rcd _____ (1995). Consequently, there is no basis under the current state of Commission precedent for consideration of those issues. In a related context, there is no Commission requirement for petitioner or any other party to demonstrate a "demand" or need for an allotment aside from the already stated willingness of Keith E. Lamonica to apply for the Channel 243A allotment at Ely and construct the proposed facilities.

TECHNICAL SUMMARY

4. Channel 243A can be allotted to Ely in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates North Latitude 39-14-51 and West Longitude 114-53-16.

5. We believe the public interest would be served by allotting Channel 243A to Ely since an interest has ben expressed in providing the community with an additional local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ely, Nevada	224C3, 243A, 269C3

6. The window period for filing applications will open on **June 23, 1995**, and close on **July 24, 1995**.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 776-1660.

[1] Petitioner's reply comments were late-filed and were not accompanied by a request for their acceptance. In addition, they were not served on SBC as required by Section 1.420 of the Commission's Rules and noted in paragraph 4 of the Appendix to the *Notice of Proposed Rule Making*. Therefore, his late-filed reply comments will not be considered.

[2] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), *recon. denied*, 56 RR 2d 448 (1984).

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-202

In the Matter of

Amendment of Section 73.202(b), RM-8051
Table of Allotments,
FM Broadcast Stations.
(Newberry Springs, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1995; Released: May 9, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 5617 (1992), issued in response to a request filed on behalf of Hills Broadcasting ("petitioner") proposing the allotment of Channel 247A to Newberry Springs, California, as that locality's first local aural transmission service. Petitioner filed supporting comments reiterating its intention to apply for Channel 247A if it is allotted to Newberry Springs, as proposed.[1] Henry Broadcasting Company ("HBC"), filed late comments, accompanied by a motion to accept.[2] [3] Petitioner filed comments in opposition, to which HBC responded.[4]

2. The *Notice* herein proposed to allot Channel 247A to Newberry Springs (population 1,500) with a site restriction 2.5 kilometers (1.6 miles) north of the community at coordinates 34-51-00 and 116-40-42. The site restriction was proposed to avoid a short spacing to the licensed site of Station KVAR(FM) (formerly KHTX-FM), Channel 248B, Riverside, California, at coordinates 33-57-57 and 117-17-21. We note that an application has been filed to relocate the transmitter site of Station KVAR(FM), and implement other minor changes in its facilities, at coordinates 34-14-04 and 117-08-24 (File No. BPH-930125ID).[5] The distance between proposed Channel 247A at Newberry Springs at coordinates 34-51-00 and 116-40-42 and the application site specified by Station KVAR(FM) at Riverside, California, is 80.4 kilometers (50 miles) whereas a minimum distance separation of 113 kilometers (70 miles) is required between first adjacent Class A-B channels. As a result, the proposed allotment of Channel 247A to Newberry Springs would preclude Station KVAR(FM) from relocating its transmitter to the site specified in its pending application (File No. BPH-930125ID).

3. Pursuant to Commission policy, a proposed allotment is generally preferred over an application representing a preference for a particular site. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984. However, the Commission will attempt to eliminate conflicts between coordinates specified by applicants and those designated in rulemaking proceedings by modifying the rulemaking proposal to specify an alternate site or an alternate channel to the extent possible. *See Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992); *recon. granted in part and denied in part*, 8 FCC Rcd 4743 (1993). *See* also, *Evans and Martinez, Georgia*, 4 FCC Rcd 7926 (1989); *Greenville, Texas*, 6 FCC Rcd 6048 (1991), and cases cited therein.

4. In this instance, in an effort to accommodate the Newberry Springs proposal, as well as the application of Station KVAR(FM) at Riverside, California, the Commission conducted an engineering analysis to determine the availability of an alternate channel to resolve the above-noted conflict. As a result, we have determined that Channel 279A is available for consideration at Newberry Springs, and can be allotted without a site restriction at coordinates 34-49-42 and 116-41-12.[6] [7]

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[1] However, petitioner did not provide supporting documentation, as requested in the *Notice*, regarding the estimated population figure (4,000 persons) attributed to Newberry Springs by the Newberry Springs Community Services District. As stated in the *Notice*, the 1992 *Rand McNally Commercial Atlas and Marketing Guide* (*"Atlas"*) attributed Newberry Springs with a population of 900. The 1994 edition of the *Atlas* credits the community with a population of 1,500. Therefore, in the absence of evidence to the contrary, for purposes of this rule making we will utilize the population data reflected for Newberry Springs in the 1994 *Atlas*. However, petitioner should note that while it is in its best interest to present the Commission with supporting evidence, preferably at the outset of the rule making process, failure to provide such information, either initially or in response to the Commission's request for additional information could in some instances, lead to a denial of the proposal.

[2] At the time its comments were filed, HBC was the licensee of Station KHTX-FM, Channel 248B, Riverside, California. According to the Commission's records, an assignment of the license for Station KHTX-FM (File No. BALH-940816EB) from HBC to San Bernardino Radio, Inc. ("SBR") was granted on October 21, 1994, and consummated December 12, 1994. The call letters were subsequently changed to KVAR(FM) effective December 13, 1994. We will serve a copy of this *Report and Order* on SBR.

[3] We will not accept HBC's comments. Section 1.415(d) of the Commission's Rules does not authorize the filing of pleadings beyond the reply comment period unless specifically requested or authorized.

[4] In view of our rejection of HBC's comments (footnote 3, *supra*), additional comments in response thereto will not be considered.

[5] Moreover, during the pendency of this proceeding, a construction permit was issued to Station KXPT(FM), Channel 246C, Las Vegas, Nevada, at coordinates 35-58-02 and 115-30-06 (File No. BPH-940725IC), which is 1.3 kilometers (1 mile) short-spaced to proposed Channel 247A at Newberry Springs. The distance between proposed Channel 247A at Newberry Springs and the construction permit site of Station KXPT(FM) is 163.7 kilometers (101 miles) whereas a distance of 165 kilometers (102 miles) is required in this instance. We also note that the construction permit issued to Station KXPT(FM) was granted in accordance with the provisions of Section 73.215 of the Commission's Rules which allows contour protection for short-spaced assignments.

[6] Channel 247A at Newberry Springs would require a site restriction 2.5 kilometers (1.6 miles) north of the community, whereas Channel 279A can be allotted in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without a site restriction. Since the

5. In view of the petitioner's stated interest in providing a first local aural transmission service to Newberry Springs, we will allot Channel 279A to that community. Additionally, as Newberry Springs is located within 320 kilometers (199 miles) of the Mexican border, the Commission obtained concurrence in the allotment of Channel 279A to that community from the Mexican government.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 23, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include Newberry Springs, California, as follows:

City	Channel No.
Newberry Springs, California	279A

7. The window period for filing applications for Channel 279A at Newberry Springs, California, will open on **June 23, 1995**, and close on **July 24, 1995**.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees of Station KVAR(FM) and Station KXPT(FM), as follows:

San Bernardino Radio, Inc.
Radio Station KVAR(FM)
1875 Century Park East
Suite 1230
Los Angeles, CA 90067

Lotus Broadcasting Corp.
Radio Station KXPT(FM)
6290 Sunset Blvd.
Hollywood, CA 90028

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 279A at Newberry Springs, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Commission endeavors to impose the least restrictive theoretical site from the intended city of license, we believe that the public interest would be better served by considering Channel 279A at Newberry Springs instead of Channel 247A. *See Vacaville and Middletown, California*, 4 FCC Rcd 8315 (1989), and cases cited therein.

[7] Station KXPT(FM), Las Vegas, Nevada, may also benefit from our determination, as consideration of alternate Channel 279A at Newberry Springs will eliminate the short spacing to its construction permit as presented by proposed Channel 247A, thereby affording the licensee greater latitude in pursuing its facility change at Las Vegas. We will serve the licensee of Station KXPT(FM) with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP.

Application for authority to acquire and operate capacity in the U.S.-Cuba No. 7 Cable System. File No. I-T-C-95-188

ORDER AND AUTHORIZATION

Adopted: April 27, 1995; Released: May 10, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-188 IS GRANTED, and AT&T Corp. (AT&T) is authorized to expand the capacity of the U.S.-Cuba No. 7 Cable System and to activate and operate 31 additional circuits for provision of its regularly authorized services between the United States and Cuba.

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MA for the U.S.-Cuba No. 7 Cable System, as well as any Commission Order granting authority to acquire and operate facilities in the U.S.-Cuba No. 7 Cable System.

4. IT IS FURTHER ORDERED that AT&T shall split 50/50 with ETECSA the $1.20 per minute accounting rate for IMTS.

5. IT IS FURTHER ORDERED that the surcharge agreed to between AT&T and ETECSA for received collect calls shall be no greater than $1.00 per call.

6. IT IS FURTHER ORDERED that AT&T shall submit reports on or before June 30, and December 31 of each year, and on the one-year anniversary of the notification of the grant of this application in the Federal Register, indicating the numbers of circuits activated by facility.

7. IT IS FURTHER ORDERED that this authorization is subject to AT&T's obtaining all necessary licenses and authorizations from the Departments of Treasury and Commerce.

8. IT IS FURTHER ORDERED that this order is subject to revocation without a hearing in the event the Department of State or the Federal Communications Commission determines that the continuation of communications between the United States and Cuba is no longer in the national interest.

9. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VYVX, INC.

Application for authority to acquire and operate facilities for provision of International Television and video services between the United States and Canada. File No. I-T-C-95-191

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 27, 1995; Released: May 10, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-191 IS GRANTED, and Vyvx, Inc. (Vyvx) is authorized to:

a. lease and operate four dark fibers between Detroit and the U.S.-Canada border at Windsor, Ontario for provision of International Television and video services between the United States and Canada; and

b. provide International Television and video services between the United States and Canada by the resale of the International Television and video services of other international carriers pursuant to their tariffs as follows: AT&T Tariff FCC No. 9, IDB WorldCom Tariff FCC No. 1, MCI/WUI Tariff FCC No. 27, and WilTel Tariff FCC No. 1.

3. IT IS FURTHER ORDERED that neither Vyvx nor any persons or companies directly or indirectly controlling or controlled by Vyvx, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Vyvx or any persons or companies controlling or controlled by Vyvx are parties.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTELCO RUSSIA CORPORATION

Application for authority to acquire and operate facilities for provision of INTELSAT Business Services, International Datanet Service and International Television Service, and for provision of services between the United States and Russia. File No. I-T-C-95-192

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 3, 1995; Released: May 10, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-192 IS GRANTED IN PART, and Intelco Russia Corporation (Intelco Russia) is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites for provision of INTELSAT Business Services (IBS), International Datanet Service, and International Television Service between the United States and the points listed in COMSAT's tariff for the space segment for IBS, International Datanet and International Television Service;

b. lease and operate four T-1 satellite circuits between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Russia, furnished by Intelco Russia's correspondent;

c. lease and operate facilities in the appropriately licensed U.S. earth station;

d. lease and operate any necessary domestic connecting facilities; and

e. use the facilities in b, c, and d, above to provide regularly authorized services, including switched voice and data and private line services, between the United States and Russia.

3. IT IS FURTHER ORDERED that neither Intelco Russia nor any persons or companies directly or indirectly controlling or controlled by Intelco Russia, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Intelco Russia or any persons or companies controlling or controlled by Intelco Russia are parties.

4. IT IS FURTHER ORDERED that our authorization of Intelco Russia to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Russia – that is, private lines which originate in the United States and terminate in Russia or which originate in Russia and terminate in the United States. In addition, Intelco Russia may not -- and Intelco Russia's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the United States or Russia end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Russia affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. IT IS FURTHER ORDERED that the authority granted herein for Intelco Russia to establish channels of communication between the earth stations in the United States and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

11. IT IS FURTHER ORDERED that the portion of the application requesting facilities in the INTERSPUTNIK satellite system is hereby DEFERRED.

12. This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

13. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Holmdel Telecommunications Group, Inc., Assignor,

and

Teleport Transmission Company, Assignee,

Application for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to assign Section 214 authorizations.

File No. I-T-C-95-163-AL

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 3, 1995; Released: May 10, 1995

By the Chief, Telecommunications Division:

1. Holmdel Telecommunications Group, Inc., ("HTG") and Teleport Transmission Company ("TTC"), pursuant to Section 214 of the Communications Act of 1934, as amended, submitted the above-captioned application requesting authority to assign HTG's Section 214 certificates to TTC.[1] The application was placed on public notice and no comments were received.

2. HTG, a New Jersey corporation, is a common carrier authorized to provide domestic and international satellite transmission and distribution services. TTC, a Colorado corporation, also is a common carrier authorized to provide international satellite services.[2]

3. The Applicants state that TTC will continue to provide the services authorized under the Section 214 certificates to be assigned with no changes in the applicable terms or conditions described in the authorizations. They state grant of this application will permit TTC to serve the public interest by allowing it to provide additional high quality international communications services to its U.S. customers.

4. In view of the foregoing, we conclude that consent to the assignment of HTG's pending and granted Section 214 certificates to TTC will serve the public interest, convenience and necessity.

5. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Holmdel Telecommunications Group, Inc., File No. I-T-C-95-163(AL) IS GRANTED and we consent to the assignment from HTG to TTC of HTG's Section 214 certificates and Special Temporary Authorization referenced in note 1, *supra*.

6. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that TTC must continue to maintain tariffs for the services authorized in this order.

7. IT IS FURTHER ORDERED that TTC must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that TTC shall file semi-annual reports of circuit additions to certificated points, pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. § 63.15.

9. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] Initially, the Applicants requested authority to assign four Section 214 certificates that had been previously assigned to HTG by Crescomm Transmission Service, Inc. *See Crescomm Transmission Service, Inc.*, 9 FCC Rcd 5312 (Tele. Div. 1994). On March 23, 1995, the Applicants filed an amendment also requesting authority to assign HTG's pending Section 214 application, FCC File No. I-T-C-95-190, and a Special Temporary Authorization associated with that application. (FCC File No. TAO-2511)

[2] *See Teleport Transmission Holdings, Inc.*, 9 FCC Rcd 6430 (Tele. Div. 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 10, 1995

UNITED STATES TELEPHONE ASSOCIATION FILES A PETITION FOR RULEMAKING TO AMEND PART 32 OF THE COMMISSION'S RULES TO ELIMINATE DETAILED PROPERTY RECORDS FOR CERTAIN SUPPORT ASSETS

PUBLIC COMMENT INVITED

The United States Telephone Association ("USTA") filed a Petition for Rulemaking ("petition"), proposing that the Commission amend Part 32 of its rules to eliminate detailed continuing property records ("CPRs") for certain support asset accounts. These support assets include the items in Accounts 2115, Garage work equipment; 2116, Other work equipment; 2122, Furniture; 2123, Office equipment; and the personal computers and peripheral equipment in Account 2124, General purpose computers. In place of CPRs for those accounts, USTA proposes that carriers be permitted to use a vintage amortization level ("VAL") property record system. Under this system, the net book value of existing assets in each account would be placed in a VAL group and amortized on a straight-line basis over the remaining life that results from the asset life chosen from the Commission approved range of lives. All new purchases would also be placed in a VAL group for each vintage for each account, and amortized in the same manner. When the assets in a VAL group are fully amortized, the assets and their associated reserves would be removed from the carriers' books. Salvage proceeds would be reflected as a decrease in amortization expense, and the cost of removal would be reflected as an increase in amortization expense.

We seek comment on the USTA petition, and we invite parties to propose alternatives for simplifying the CPR requirements for these support assets. We encourage parties to focus on how USTA's proposal or any alternative proposal provides for adequate internal controls to safeguard these support assets. We seek comment on what records are necessary to ascertain the location, existence, and cost of these assets. We also seek comment on how carriers should account for retirement of these support assets, and whether these assets should be removed from the carrier's books when fully amortized, as USTA proposes. Finally, we seek comment from any parties believing that our CPR requirements should not be modified for support assets. These parties should explain why, and should emphasize what aspects of our current CPR requirements are the most useful.

Parties may file comments on USTA's petition, or propose alternatives no later than **July 5, 1995**. Replies should be filed by **August 1, 1995**. Comments should refer to RM-8640. A copy of each pleading should be sent to Debbie Weber, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies of USTA's petition and any comments will be available for public inspection and copying in the Office of Public Affairs Reference Center, 1919 M St., N.W., Room 239, Washington, D.C. Copies are also available from ITS.

For further information contact Debbie Weber at (202) 418-0812.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Border to Border Communications, Inc. — AAD 94-61

Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995; Released: May 10, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 5, 1994, Border to Border Communications, Inc. ("BBC," or "Petitioner"), filed a petition ("Petition") requesting that the Commission grant it a waiver of Sections 36.611 and 36.612 of the Commission's rules to allow BBC to receive Universal Service Fund ("USF") support beginning April 2, 1994.[1] BBC also requests that the Commission direct the National Exchange Carrier Association, Inc. ("NECA") to disburse such USF support consistent with the methodology proposed in the Petition. On June 6, 1994, the Common Carrier Bureau ("Bureau") released a public notice soliciting comments on the petition for waiver.[2] Four parties filed comments and three parties filed reply comments.[3] In addition, BBC provided supplemental financial and cost data concerning the Petition on June 7, 1994.[4] In this order, we grant the Petition, in part, as explained more fully below.

II. BACKGROUND

2. *BBC service area.* On August 1, 1991, BBC was granted a certificate of convenience and necessity from the Public Utility Commission of Texas ("Texas PUC") and became a newly authorized local exchange carrier ("LEC") within the State of Texas. On April 2, 1994, BBC began providing local exchange service to portions of Zapata County previously without telephone service. The BBC service area encompasses 850 square miles. It is located within Zapata County and borders the Republic of Mexico. Because this service area is largely unsettled and has few public roads, BBC constructed a local exchange network that relies on radio facilities in addition to traditional land line facilities.[5]

3. *USF program.* The Commission established the USF program to promote the nationwide availability of telephone service at reasonable rates. Toward this end, USF support permits high-cost LECs to reduce local rates by recovering additional expenses from the interstate services they provide.[6] Eligibility for USF support is based on historical data, and thus, a newly established LEC typically would not be eligible for support under Sections 36.611 and 36.612 until its third year of operation. Those rules impose certain data requirements and filing dates that, for new LECs, effectively impose a waiting period of up to two years for the receipt of assistance. Pursuant to the methodology prescribed by the Commission's rules, NECA calculates the level of USF support for a particular study area based on the historical loop-cost data that each LEC must provide to NECA.[7] The required data include certain expenses, investment costs and working loop counts for a 12-month period. LECs must report these data by July 31 of each year for the full 12 months of the preceding calendar year.[8]

4. NECA uses these data to develop and file access charge tariffs that, if approved by the Commission, become effective on January 1 of the following calendar year.[9] In addition to calculating the amount of USF assistance provided to individual study areas, NECA also calculates the total USF assistance available to all study areas combined. During an interim period from January 1, 1994 to January 1, 1996, the total USF is subject to an indexed cap. That cap allows the total USF to increase each calendar year at the annual rate of increase in the industry's total number of working loops.[10]

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[1] *See* 47 C.F.R. §§ 36.611 and 36.612.

[2] Public Notice, 9 FCC Rcd 2537 (Com. Car. Bur. 1994).

[3] Comments were filed by MCI Telecommunications Corporation ("MCI"), NECA, the National Telephone Cooperative Association ("NTCA"), and the United States Telephone Association ("USTA"). Reply comments were filed by American Telephone and Telegraph ("AT&T"), BBC and NTCA.

[4] Letter from Thomas Moorman, BBC, to William Caton, Acting Secretary, FCC, dated June 7, 1994 ("Border Letter").

[5] *See* Petition at 2-4.

[6] USF assistance is provided in the form of an expense adjustment that shifts a portion of total expenses from the state to the interstate jurisdiction. *See generally,* Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

[7] *See generally 47 C.F.R.* §§ 36.601-36.631.

[8] *See* 47 C.F.R. § 36.611. *See also* NECA Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules, MO&O, 9 FCC Rcd 2531 (Com. Car. Bur. 1994). LECs may choose to make three data submissions, as quarterly updates, in addition to the required July 31 annual submission. LECs reporting data for the last nine months of the previous calendar year and the first three months of the existing calendar year must submit data no later than September 30 of the current calendar year. LECs reporting data for the last six months of the previous calendar year and the first six months of the current calendar year must submit that data no later than December 30 of the current calendar year. Finally, LECs reporting data for the last three months of the second preceding calendar year and the first nine months of the previous calendar year must submit that data no later than March 30 of the current calendar year. *See* 47 C.F.R. § 36.612.

[9] *See* 47 C.F.R. § 36.611.

[10] 47 C.F.R. § 36.60. *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 303 (1993) (*"Interim Cap Order"*). The Commission adopted the indexed cap to moderate growth in the USF during a two-year interim period in which a rulemaking proceeding on permanent

III. PETITION AND COMMENTS

5. *Petition.* BBC seeks a waiver of Sections 36.611 and 36.612 of the Commission's rules to permit it to receive USF support starting when it first began providing service. BBC proposes that it be permitted to use a combination of current and projected data rather than the required 12 months of historical data. Specifically, BBC requests that it be permitted to use a rolling annualized average of such combined data that would be reconciled quarterly with actual costs. BBC states that, over time, an increasingly larger share of its projected cost data would be replaced with actual cost data so that in time the USF calculations would be based entirely on historical data.[11]

6. BBC asserts that the rules requiring USF assistance to be based on 12 months' historical data are not intended to preclude new LECs from having immediate access to assistance if they need it to set rates at affordable levels. BBC states that a grant of the requested waiver is consistent with the intent of the USF, *i.e.*, to assist LECs serving high cost areas in maintaining affordable local service rates. BBC claims this goal will be frustrated if the requested waiver is not granted because the Commission's rules would have the unintended result of preventing a new LEC from being able to offer affordable local service during its first year of operation. BBC argues that, absent the waiver, its monthly local service rate for residential customers would be prohibitively expensive. Specifically, in order to allow recovery of all of BBC's costs, this monthly rate would need to be at least $239 per subscriber line, which is $220 greater than the $19 rate approved, on an interim basis, by the Texas PUC. BBC concludes that such an excessive local residential rate would be contrary to the public interest. The lack of affordable service, BBC states, would leave the residents within its service area isolated from the community of Zapata and the city of Laredo, as well as from their schools, hospitals, and government centers.[12]

7. BBC estimates that its share of USF assistance would be approximately $149,414 for the nine-month period from April 2, 1994 to the end of 1994.[13] BBC states that, because the USF is currently capped, its receipt of such assistance would not affect existing payment obligations of parties paying into the USF.[14]

8. *Comments.* NECA, NTCA and USTA support the Petition. NECA claims it would be unfair to require new LECs to wait two years to start receiving USF payments because this delay could deter them from providing service in territories that currently are unserved. NECA further claims that it is unclear whether the Commission intended that the USF assistance provided to new LECs is to be included in the USF cap. NECA submits that, in the Commission order adopting this cap, the language does not specifically address how the cap is affected when new carriers begin serving previously unserved territories. NECA concludes that the Commission should consider whether the cap will be adjusted upward to accommodate BBC's entry into service. If this adjustment is not made, NECA states, the granting of BBC's petition would result in a reduction in the USF payments to existing USF participants, even though their cost characteristics had not changed. NECA states that the methodology BBC proposes for calculating its USF draw is administratively feasible and would not disrupt NECA's administration of the fund as a whole.[15]

9. NTCA states that, because BBC has no more than 75 working loops, it cannot have a noticeable impact on the growth of the USF cap. NTCA also states that BBC's choice of a combined radio and copper cable design, at a substantial cost savings compared with the traditional copper cable design, indicates that BBC has seriously examined the cost issue and is not expending funds unnecessarily. NTCA submits that BBC's service area is part of a region that, according to 1990 Census Bureau data, exhibits a low median household income level and a telephone penetration level of only 78 percent. NTCA claims these statistics show that the households in BBC's service area need service.[16]

10. MCI conditionally opposes the Petition. MCI states that it does not oppose BBC's proposed waiver to the extent it would allow BBC to receive USF support at an earlier date. MCI states that it is alarmed, however, at the extraordinary high loop cost that BBC anticipates in order to serve 75 customers. MCI submits that, if BBC's average annual loop cost proves to be $3,828 as BBC projects, BBC will have established a new national record for loop cost under the USF program. MCI further submits that, when BBC filed its local exchange rate application with the Texas PUC, BBC estimated its average annual loop cost to be $6,096, an amount 59 percent greater than the $3,828 estimate reported in the instant waiver petition. MCI argues that the great disparity between these two cost estimates, together with the extraordinarily high level of both estimates, raise serious questions of reasonableness, particularly with respect to the basis on which BBC is calculating its loop costs. For these reasons, MCI requests that the Commission thoroughly examine BBC's loop costs before granting the waiver request.[17] In response, BBC claims that the disparity between its cost estimates is due to the use of updated cost information in the Petition, which was submitted in May 1994. That information was unavailable, BBC states, when the earlier estimate was provided to the Texas PUC in October 1993.[18]

11. AT&T does not oppose the Petition. AT&T does oppose, however, NECA's suggestion that the Commission consider raising the USF indexed cap to accommodate BBC's eligibility for assistance and thereby prevent a reduction in assistance to existing USF recipients. AT&T submits that, since the adoption of the *Interim Cap Order*, the Commission has not made such an adjustment to the cap when granting study area waiver requests even though the Commission recognized that many of those waivers would result in a redistribution of the USF among eligible recipi-

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USF changes is pending. *See Id.* at 303; and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 8 FCC Rcd 7114 (1993) (*"USF Notice"*).

[11] Petition at 10-11.

[12] *Id.* at 3 and 7-9. The estimated monthly rate of $239 is based on BBC's assumption that all of the 75 potential subscribers within the BBC serving area agree to subscribe to residential service. *Id.* at 9.

[13] Petition at 8 and Attachment A.

[14] *Id.* at 7 and 10.

[15] NECA Comments at 4-6.

[16] NTCA Comments at 2-4.

[17] MCI comments at 2-5.

[18] BBC reply comments at 4-5.

ents. AT&T argues that, with respect to this redistributive effect on the USF, there is no difference between a new LEC such as BBC and the new or expanded study areas that serve an established customer base. AT&T further argues that such an adjustment to the cap is contrary to the Commission's express objectives in adopting the *Interim Cap Order*. That objective, AT&T observes, is to produce a stable and moderate USF growth during the two-year interim period while preserving adequate support for the recipients most in need of assistance.[19]

IV. DISCUSSION

12. Waiver of a Commission rule is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[20] Further, the waiver generally must be consistent with the principles underlying the rule for which a waiver is requested.[21] As noted above, a primary principle underlying Sections 36.611 and 36.612 is that the goal of the USF program is to promote the nationwide availability of telephone service at reasonable rates by assisting LECs operating in high-cost areas.

13. BBC claims that, given its special circumstances as a high-cost LEC entering a territory previously without service, the rules would frustrate that Commission goal and disserve the public interest. This is so, BBC argues, because the rules would compel it to charge such high rates during its first two years of operation that potential customers effectively would be denied service. In contradiction to this claim, however, BBC already has been providing residential service for more than a year at an affordable monthly rate of $19 per loop. BBC has not shown that this rate has discouraged customers from seeking service. We therefore find, to this point in time at least, that the rules have neither frustrated the Commission's goal nor disserved the public interest. Consequently, we conclude that BBC should not be allowed to receive USF support for the period predating the effective date of this order.

14. Whether this situation will persist, however, is unclear. One possibility is that the Texas PUC could allow BBC to raise rates substantially above the current levels, an action that might result in customers effectively being denied service, as BBC predicts. Another possibility is that BBC, being confronted by average loop costs well in excess of the allowed rates, will choose to terminate service before the end of the year. In either case, the rules would have the unintended effect of discouraging service in a high cost area. This consideration implies that, under BBC's special circumstances, the rules may frustrate the Commission goal of promoting affordable service and thus may disserve the public interest. The likelihood of such an outcome cannot be readily dismissed, particularly when we consider the high average loop costs demonstrated by BBC.[22] For this reason, we find BBC has shown good cause for a granting of the waiver for the remainder of this year. We therefore grant the requested waiver, in part, to allow BBC to be eligible to start receiving USF support on the effective date of this order.

15. Another aspect of the waiver request warrants discussion. NECA claims that the language in the *Interim Cap Order* does not address how the USF is affected when new high-cost carriers, such as BBC, begin serving previously unserved territories. Specifically, NECA claims it is unclear whether the Commission intended the magnitude of each year's USF to be increased to accommodate the support provided to these new LECs. NECA suggests that the Commission consider requiring such an increase so as to prevent the entry of new high-cost LECs from reducing the capped support payments to existing USF participants.

16. We disagree with NECA's claim that the Commission's intent is unclear. In the *Interim Cap Order*, the Commission decided to index the rate of growth in the USF to the nationwide rate of growth in total loops because, with such an index, an expansion in the subscriber base leads to an increase in the authorized USF and thus permits additional support to the LECs that expand service to new customers.[23] This consideration implies that the indexing of the USF growth already accommodates the situation in which service is provided to previously unserved customers. Regardless of whether the new customers are served by an existing LEC or by a new LEC such as BBC, the USF will be automatically increased by an amount corresponding to the growth in total loops. Hence, BBC's new operations will increase the size of the USF by contributing to the total number of working loops.

17. Moreover, there is a second reason why the Commission chose the rate of growth in total working loops as the measure by which the USF is to grow during the interim period. The stability of this measure assures that the USF will grow only moderately and predictably during the period in which the Commission is reviewing the USF program.[24] NECA's proposal is inconsistent with this Commission goal because, if the USF were increased to accommodate all support provided to new LECs entering unserved territories--as NECA suggests--the USF growth would be potentially unpredictable.

V. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of Border to Border Communications, Inc. for waiver of Sections 36.611 and 36.612 of the Commission's rules, 47 C.F.R. §§ 36.611 and 36.612, IS GRANTED IN PART, to the extent described above.

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[19] AT&T reply comments at 2-3.

[20] *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied.*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir 1990).

[21] City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 662-63 (D.C. Cir. 1984).

[22] BBC provided a summary of the system plan, including a description of the radio, microwave and other equipment employed. That summary contains sufficient detail to provide a clear picture of BBC's operations. BBC also provided maps of the service area, loan documents showing financial arrangements, and engineering reports estimating construction costs and operating expenses. These cost estimates were based on updated engineering reports and actual financial arrangements. In contrast, the cost estimates that BBC had provided a year earlier to the Texas PUC had been based on pro-forma financial statements and early cost projections.

[23] *Interim Cap Order*, 9 FCC Rcd at 305.M

[24] *Id.*

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-127

In the Matter of

Amendment of Section 73.202(b), RM-8537
Table of Allotments,
FM Broadcast Stations.
(Wright City, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1995; Released: May 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 6696 (1994), proposing the allotment of Channel 277A to Wright City, Oklahoma, as the community's first local aural service. The *Notice* was issued in response to a petition filed by Texarkana Broadcasting, Incorporated ("petitioner"). Petitioner filed initial comments withdrawing its petition for rule making. No other comments were received.

2. As stated in the Appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent such an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of Texarkana Broadcasting, Incorporated, requesting the allotment of Channel 277A to Wright City, Oklahoma, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

STAUFFER COMMUNICATIONS, INC. BRCT-930528KK

For Renewal of License of
Station KGWN-TV
Cheyenne, Wyoming

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 7, 1995; Released: May 10, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for the above-listed television station;[1] and (ii) the licensee's response to a staff letter of inquiry.

II. DISCUSSION

2. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b), 73.2080(c).

3. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987); *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

4. The station's 1993 EEO Program Report[2] and inquiry response reveal that the licensee filled 26 full-time vacancies, including 20 for upper-level positions, from April 1, 1990, to April 1, 1993.[3] For 15 of the 26 full-time job openings, the licensee contacted one to three general sources, including *The Wyoming State Tribune, The Wyoming Eagle, RTNDA Communicator*, Job Service of Wyoming, Media Link, Colorado State University, the University of Wyoming, Laramie County Community College, East High School and Central High School. For two additional vacancies, filled by walk-in applicants, the licensee indicates that, "other recruitment sources were contacted....." However, it is unable to provide any information about these sources. The licensee failed to recruit for the remaining nine vacancies, the applicantpools of which consisted of walk-ins, former employees and applicants referred by employees. In its EEO Program, the licensee states that it annually contacts minority organizations (but does not specify which minority organizations) by letter requesting referrals of minorities for employment at the station.[4]

5. Minorities were included in the applicant and interview pools for at least two of the 26 full-time overall and one of the 20 upper-level vacancies.[5] The licensee hired

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[1] The license of KGWN-TV expired October 1, 1993. On September 15, 1994, the licensee of KGWN-TV filed an application to assign the license of the station (File No. BTCCT-940915KI) from Stauffer Communications, Inc. to Morris Communications Corporation. The application is currently pending.

[2] The Commission has stated that it will apply the 1990 Census Data only to license renewal EEO programs due to be filed after May 31, 1993. KGWN-TV filed its application for renewal on June 1, 1993. Therefore, 1990 Census Data are effective commencing with the 1993 Employment Profile. If a license term includes years prior to 1993, both 1980 and 1990 data will be used in staff analysis. It was not possible to use the 1990 Census Data any earlier given legal challenges to the report and a delay in receiving the final compilation of Labor Force statistics. "EEO Branch of MMB To Use 1990 U.S. Census Data," Public Notice #32651 (April 12, 1993).

[3] The licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an affirmative obligation to recruit for females and minorities for each vacancy. To the extent that the licensee's recruitment efforts were inconsistent, female, as well as minority, employment was affected.

[4] Additionally, the licensee provided in its inquiry response copies of letters dated November 2, 1993, sent to the following additional sources to express the station's interest in using them as sources for recruiting qualified minority and female applicants: three Hispanic organizations -- Hope, the Latin American Association and SOMOS; the Cheyenne Indian Center; three local Black churches -- the Second Baptist Church, the Unity Missionary Church and the Allen Chapel African Methodist Episcopal Church; the Love and Charity Club, Inc. (a local Black organization); and the *GI Forum*. The licensee also states that notices of job openings will be sent to these organizations as they occur. However, these new recruitment sources were not contacted until after the license term expired. *See* 47 C.F.R. Section 73.1020(a).

[5] For eleven of the full-time job openings, ten upper-level, listed in its inquiry response, the licensee states that multiple applicants applied for the positions, but it "does not have com-

one minority, an American Indian, for an Office and Clerical position.[6] Thelicensee recognizes that it has had difficulty in attracting a substantial number of Hispanics, the dominant minority in Cheyenne, and other minorities for employment at the station. The licensee believes that part of the station's difficulty in this area has been due to "the low salaries (as compared with other businesses) that entry-level personnel are paid upon beginning employment at the station."[7]

6. There are no substantial and material questions of fact warranting designation for hearing. *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Moreover, there is no evidence that the licensee engaged in employment discrimination. Accordingly, grant of the station's renewal application is warranted.

7. However, we find KGWN-TV's overall recruitment efforts deficient because it failed to conduct recruitment whenever vacancies occurred, it failed to contact minority specific sources for any of its vacancies during the period under review, and it failed to attract minorities for a significant number of its applicant and interview pools. The licensee also failed to maintain adequate records for meaningful self-assessment. 47 C.F.R. § 73.2080.

8. In 1994, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO rules. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929 (1994) ("EEO Policy Statement") (petitions for reconsideration and requests for clarification pending). A court decision issued since the EEO Policy Statement ruled that our general policy statement on forfeitures[8] must be put out for notice and comment. *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment. *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard*, July 13, 1994. We will respond to these concerns in a separate order. In the meantime, we will utilize our pre-January 1994 process of assessing forfeitures.[9]

9. Before adoption of the EEO Policy Statement, we used a process of *stare decisis* in considering sanctions for violations of our EEO rule. We would analogize the cases to previously decided cases based on factors such as, but not limited to, station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping. Under this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of the pertinent case precedent.

10. We find that the record in the instant case is similar to but more egregious than that of the licensee of WLIT/WYAV-FM, Conway, South Carolina, in *Letter to George G. Beasley, President - Beasley Broadcast Group*, 4 FCC Rcd 5214 (1989).[10] As in this case, the licensee therein was unable to substantiate its EEO performance regarding recruitment of minorities or women because of incomplete or unavailable records. Notwithstanding the lack of documentation, the stations claimed to have followed consistent recruitment procedures in filling 16 of the 36 full-time job vacancies. For those 16 vacancies, the stations indicated that they contacted 14 minority-oriented organizations and institutions whenever a vacancy occurred. The stations failed to report the extent to which, if any, referrals were obtained from the 14 minority organizations contacted. Moreover, while the source of the referral was unclear, it appears that minorities were considered for only one of these 16 vacancies. Minorities were hired for three of the 36 vacancies. The three minorities (all Black), however, were hired approximately two weeks prior to the filing of the renewal applications. Although it appears from the information that few minorities were in the applicant pools, the licensee appeared neither to engage in meaningful assessment of its efforts nor to expand or modify its efforts to seek out applicants until after filing the instant renewal applications. The licensee received a $3,000 Notice of Apparent Liability and reporting conditions.

11. WLIT/WYAV-FM, although issued in 1989, was decided based on a former forfeiture authority, which was significantly lower than our current authority.[11] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a

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plete information on these individuals' race/national origin, gender or the recruitment source which referred them." Additionally, for five of these 11 full-time job openings, four upper-level, the licensee states that multiple persons were interviewed for the positions, but it "does not have complete information on these individuals' race/national origin, gender or the recruitment source which referred them."

[6] According to 1980 census data, the Cheyenne, Wyoming MSA, in which the station is located, had an 11.6% minority labor force (1.9% Black, 8.3% Hispanic, 0.6% Asian/Pacific Islander, and 0.8% American Indian). The station's 1989 Annual Employment Report lists one Hispanic, one Asian/Pacific Islander and one American Indian among 42 full-time employees (7.1%), and among 34 upper-level job employees (8.8%). The 1990 report lists one Hispanic, one Black, one Asian/Pacific Islander and one American Indian among 45 full-time employees (8.9%), and among 37 upper-level job employees (10.8%). The 1991 report lists one Hispanic and one Black among 43 full-time employees (4.7%), and among 35 upper-level job employees (5.7%). The 1992 report lists one Hispanic, one Black and one American Indian among the 44 full-time employees (6.8%), and among 36 upper-level job employees (8.3%). According to the 1990 Census, the Cheyenne, Wyoming MSA has a 13% minority labor force (2.0% Black, 9.1% Hispanic, 1.0% Asian/Pacific Islander, and 0.9% American Indian). The 1993 report lists one Black and one American Indian among 43 full-time employees (4.7%), and among 36 upper-level job employees (5.6%).

[7] However, we note that there is no evidence to indicate that this factor would affect minority and non-minority applicants differently.

[8] *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

[9] The Commission has, however, received authority to assess higher forfeitures for violations of its rules. Pub. L. No. 101-239, 103 Stat. 2131.

[10] The 1980 labor force for minorities in Horry County, South Carolina, was 19.4% (17.9% Black, 0.9% Hispanic, 0.4% Asian/Pacific Islander, and 0.2% American Indian).

[11] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000." In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 101-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act."

12. The licensee's recruitment efforts in the instant case were deficient because it failed to recruit so as to attract an adequate pool of minority applicants for its 26 full-time positions. Only two of the 26 overall applicant and interview pools (8%) contained minorities, and only one of the 20 upper-level applicant and interview pools (5%) contained a minority. In this regard, the licensee failed to recruit for 11 of the 26 hires (42%), failed to contact minority sources for any of its vacancies, and failed to keep complete records of applicants, interviewees and recruitment sources contacted.

13. The similarities between the above-cited stations' EEO records are clear. Both licensees' stations were located in areas with significant minority labor forces and both failed to recruit for significant numbers of openings -- 11 (42.3%) of 26 openings for KGWN-TV and 20 (55.6%) of 36 for WLIT/WYAV-FM. In addition, both stations failed to keep complete record of their applicants, interviewees and recruitment contacts, information that we believe better enables licensees to self-assess the effectiveness of their recruitment efforts. However, the licensee of WLIT/WYAV-FM contacted minority-specific sources during the period under review. In contrast, KGWN-TV used no minority-specific sources until after the license term expired. Post-term EEO performance is not considered in the Commission's evaluation of a licensee's EEO record during a license term if that record, standing alone, is so deficient that it would merit denial of renewal or other sanctions. *Rust Communications Group, Inc.*, 73 FCC 2d 39, 53 (1979). *See also Applications of Stauffer Communications, Inc. For Renewal of Licenses of Stations KGNC/KGNC-FM, Amarillo, Texas*, 9 FCC Rcd 879, 882 n.4 (1994). Here, we will not consider the licensee's post-term recruitment sources because, as we find, *infra*, the licensee's EEO record, during the license term, warrants a sanction. Given the facts of this case, broadcasters' familiarity with our long standing EEO Rule as well as our expanded forfeiture authority in this area, we believe that the circumstances in this case justify issuance of a Notice of Apparent Liability for $12,000. Accordingly, we will grant renewal subject to reporting conditions as set forth below and issue a Notice of Apparent Liability for $12,000.

14. In view of the pending assignment application for KGWN-TV, we note that upon grant of that application, reporting conditions will follow the license as a matter of law and pass automatically to the assignee. *See Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989); *Applications of Beacon Broadcasting Corporation For Renewal of Licenses of Station WBNR(AM), Beacon, New York, and Station WSPK(FM), Poughkeepsie, New York*, 9 FCC Rcd 2132 (1994).

III. CONCLUSION

15. Upon review of the record, we find no hearing is warranted and that renewal of the license is appropriate. However, we will grant the renewal subject to reporting conditions and issue a Notice of Apparent Liability for $12,000.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, that the renewal application filed by Stauffer Communications, Inc. for Station KGWN-TV IS GRANTED subject to the reporting conditions described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $12,000.

17. IT IS FURTHER ORDERED, that the licensee of Station KGWN-TV submit to the Commission an original and one copy of the following information on June 1, 1996, and June 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. This list should also note which recruitment sources were contacted;[12]

(b) A list of employees as of the May 1, 1996, payroll period for the first report and as of the May 1, 1997, payroll period for the second report, by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

18. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the licensee have any questions regarding this action, it may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules.

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[12] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/96)

as summarized in the attachment to this *Memorandum Opinion & Order and Notice of Apparent Liability*. Any comments relating to the ability to pay should include those financial letters set forth in the noted attachment.

19. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order* to all parties.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. Benchmark Filing To Support Cable Programming Service Prices	CUID Nos. NY1280, NY1281 NY1340 and NY1402

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1995; Released: March 7, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. (collectively "Time Warner") were charging for their cable programming service ("CPS") tier in New York, New York (CUID Nos. NY1280, NY1281, NY1340, NY1402). Time Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Time Warner's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints were completed and served on Time Warner by the City of New York before September 1, 1993.[11] The Commission received the complaints on September 2, 1993.

5. Time Warner attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Time Warner amended its justification on May 29, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] and again on December 22, 1994 and January 11, 1995 in response to Commission letters which requested further clarification of Time Warner's amended showing.[13] Time Warner further amended and supplemented its filings on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Time Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Time Warner implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in Time Warner's price for the period after May 14, 1994 must be implemented to reflect the fact that Time Warner's price during the earlier period, which is used as a starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaints were dated August 31, 1993 and state that they were mailed to Time Warner on that date. Time Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 1, 1993, the date when the Commission's rate regulations became effective, as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Zenji Nakazawa, FCC, to Barry Rosenblum, President, Time Warner Cable of New York City (Dec. 9, 1994); Letter from Zenji Nakazawa, FCC, to Arthur H. Harding, Counsel to Time Warner Cable of New York City (January 5, 1995).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable*

III. DISCUSSION

6. Time Warner asserts that its monthly CPS tier price of $9.32 per subscriber for CUID Nos. NY1280, NY1281, NY1402 and NY1340 is justified by its May 29, 1994 benchmark filing because its price is less than the maximum permitted charge of $9.33 as calculated in the filing. Upon review of Time Warner's FCC Form 393, as amended, we have found the following errors that require a recalculation of Time Warner's maximum permitted CPS price:

a. In its initial filing, Time Warner improperly combined in a single FCC Form 393 filing areas in which it offered subscribers different numbers of rate-regulated and satellite channels. According to information supplied by Time Warner, subscribers inp CUID No. NY1340 received a different channel line-up from subscribers in CUID Nos. NY1280, NY1281, and NY1402. The instructions to Form 393 clearly state that separate community units may be combined in a single filing only if "all relevant factors (including program service and equipment rates, channel line-ups and franchise fees) are identical."[15] Time Warner therefore should have completed and filed separate Forms 393 for these two areas. In its February 7, 1995 amendment, Time Warner provided us with the necessary data to calculate separately the maximum permitted price for each area covered by this Order.

b. In all of the franchise areas addressed herein, Time Warner's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part II, Worksheet 1) count channels 49 and 25 as one-half of a satellite channel each.[16] However, according to Time Warner's December 22, 1994 amendment, channel 49 carried rate-regulated satellite services (National Jewish Television and Silent Network) only 26 hours per week, with the rest of the time divided between a rate-regulated non-satellite service (Cable Information Channel) for 63.50 hours per week and a pay-per-channel service that is not subject to rate regulation (Bravo) for 78.50 hours per week. Similarly, channel 25 carried Mind Extension University (a satellite service) 7 hours per day and WNYE (a non-satellite service) 17 hours per day. Thus, neither of these channels carried rate-regulated satellite programming during the majority of programming hours. [17]

c. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[18] We therefore adjust the number of rate-regulated satellite channels as of September 1, 1993 from 37 to 36. This adjustment reduces the benchmark channel rate entered on Line 121 of Worksheet 1.

d. In reporting its capital costs of service installation and maintenance of equipment on Part III, Schedule A, Time Warner overdepreciated its vehicles, exceeding the net book value of the asset. This is in violation of Generally Accepted Accounting Principles. The remaining book value prior to applying the annual depreciation expense ($52,142) was less than the annual depreciation expense ($230,509). Therefore, the depreciation expense was decreased to $52,142 in order to match the remaining book value.

e. In calculating the percentage of its maintenance and installation costs (excluding the purchase cost of customer equipment) attributable to customer equipment and installations on Form 393, Part III, Line 2, Time Warner allocated none of its capital costs from Form 393, Part III, Schedule A to customer equipment and installations.[19] This allocation indicates that none of Time Warner's vehicles, tools, and maintenance facilities were used for installing service or maintaining customer equipment. Despite the Commission's specific request, Time Warner failed either to justify this implausible assertion or to offer an alternative allocation of these costs.[20] By failing to allocate capital costs to customer equipment and installations, an operator could increase its CPS price. We therefore substitute a reasonable allocation of these costs based on the record before us. In its December 22, 1994 amendment, Time Warner states that it allocated 58.19% of its expenses on Form 393, Part III, Schedule B to customer equipment and installations. We will apply the same percentage allocation to the capital costs in Schedule A (as adjusted pursuant to para. 6d, *supra).* This adjustment increases Time Warner's total customer equipment maintenance and installation costs (excluding the cost of leased equipment) on Form 393, Part III, Line 3 from $9,356,126 to $11,107,968.

f. In its amended Form 393 filing, Time Warner calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Time Warner's use of October 1993 as the ending date through

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Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan.20, 1995).

[15] FCC Form 393, p.10 n.1.

[16] Time Warner correctly counted each of these channels as a full rate-regulated channel.

[17] For purposes of calculating the benchmark, satellite channels include only services that are subject to rate regulation, and not pay-per-channel or pay-per-view services. *See* FCC Form 393 instructions, p. 11, Line 121.

[18] *See Viacom Cable, Nashville, Tennessee,* CUID No. TN0148, DA 94-1151, para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[19] Response of Barry Rosenblum, President, Time Warner Cable of New York City to Zenji Nakazawa, FCC (December 22, 1994).

[20] Response of Barry Rosenblum, President, Time Warner Cable of New York City to Zenji Nakazawa, FCC (January 11, 1995).

which it calculated the inflation adjustment is impermissible. Time Warner was served with a complaint prior to September 1, 1993. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1993 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[21] Time Warner cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393 within this 30-day period. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[22] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Time Warner should have used in justifying its rates.

7. Because of these errors, we conclude that Time Warner has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. For CUID Nos. NY1280, NY1281 and NY1402, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $9.20 (as Time Warner calculated in its February 7, 1995 filing) to $8.54. For CUID No. NY1340, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.91 (as Time Warner calculated in its February 7, 1995 filing) to $8.25.[23]

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that for CUID Nos. NY1280, NY1281 and NY1402, Time Warner's showing supports a maximum reasonable CPS tier price of $8.54 per month (plus franchise fee) for the period September 2, 1993 to May 14, 1994. We conclude that for CUID No. NY1340, Time Warner's showing supports a maximum reasonable CPS tier price of $8.25 per month (plus franchise fee) for the period September 2, 1993 to May 14, 1994.[24] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Time Warner must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Time Warner's price during the earlier period was unreasonable.[25] We reserve the right to make further adjustments to Time Warner's prices for the period after May 14, 1994 upon completion of our review of Time Warner's FCC Form 1200 rate filings.

10. We further conclude that Time Warner has submitted in good faith timely optional supplemental filings in response to our Public Notice.[26] As provided in the Public Notice, we will relieve Comcast of its obligations to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the August 31, 1993 complaints against the cable programming service price charged by Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc., New York, New York, CUID Nos. NY1280, NY1281, NY1340, and NY1402, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. with respect to New York, New York for the period of September 2, 1993 to May 14, 1994, justifies maximum prices of $8.54 per month (plus franchise fee) for CUID Nos. NY1280, NY1281, and NY1402 and $8.25 per month (plus franchise fee) for CUID No. NY1340 for Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc.'s cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from September 2, 1993[27] to May 14, 1994, that exceeded $8.54 (plus franchise fee) per month for CUID Nos. NY1280, NY1281 and NY1402 and $8.25 (plus franchise fee) per month for CUID No. NY1340 and were thus unreasonable, plus interest to the date of the refund.

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[21] *See* 47 C.F.R. § 76.956(a).

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[23] Specifically, these adjustments have the effect of causing Time Warner to calculate its permitted rates from Form 393, Part II, Worksheet 2 rather than Worksheet 1. However, Time Warner failed to respond to the Commission's request that it complete Worksheet 2 of Form 393. *See* Time Warner's Response to Federal Communications Commission's Inquiry, filed on December 22, 1994. Therefore, we have computed Worksheet 2 by using data supplied by Time Warner on its Form 1200 filing, with the assumption that subscribers and equipment revenue were divided between the two areas on September 30, 1992, in the same proportions as on September 1, 1993.

[24] These finding are based solely on the representations of Time Warner listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[25] We reviewed Time Warner's FCC Form 1200 rate filing and confirmed that Time Warner calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[26] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[27] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

14. IT IS FURTHER ORDERED that Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing their plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the City of New York, CUID Nos. NY1280, NY1281, NY1340, and NY1402 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee) in each franchise area.

16. IT IS FURTHER ORDERED that Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, CPS tier prices that reflect the reductions in the CPS rate determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc. shall not be required to obtain advance approval of adjustments to their CPS prices in the franchise areas addressed herein for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of the
Cable Television Consumer Protection and
Competition Act of 1992:
Rate Regulation

ORDER

Adopted: March 6, 1995; Released: March 7, 1995

By the Chief, Cable Services Bureau:

I. Introduction

1. In this Order, the Bureau grants a waiver of the requirement, stated in the *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking* (*"Sixth Reconsideration Order"*),[1] that operators file with the Commission, for each New Product Tier ("NPT"), the names of the programming services contained on the NPT and the price of the NPT within 30 days of the approval of this requirement by the Office of Management and Budget ("OMB"). The Bureau also clarifies its position on packages of services to which this requirement, and the similar requirement that operators file with the Commission whenever they make a rate or service change on an NPT, applies.

II. Background

2. In the *Sixth Reconsideration Order*, the Commission established NPTs, which are tiers of unregulated programming.[2] The *Sixth Reconsideration Order* also settled the issue[3] of how packages of per-channel, or a la carte, offerings should be treated by concluding that these packages are included among the definition of NPTs.[4] While NPTs are not subject to rate regulation, they are subject to filing and other requirements. Specifically, within 30 days of the approval of this requirement by the Office of Management and Budget ("OMB"), and whenever a new NPT is offered, an operator must file with the Commission the names of programming services contained on each tier and the price of each tier.[5] The requirement also necessitates the filing of an updated rate card and a copy of customer notification within 30 days of a rate or service change affecting the package.[6] In a Question and Answer, we interpreted the *Sixth Reconsideration Order*'s filing requirements on NPTs as applying to premium channel packages.[7]

III. Waiver of the Initial Filing Requirement

3. Under our rules, operators are required to make an initial filing within 30 days of the approval of the filing requirement by OMB.[8] OMB approval of the filing requirement took place on February 21, 1995, but we believe that operators may not be aware of that approval until the release of this Order. Although the rule was intended to give operators 30 days in which to make their initial filings, we recognize that enforcement of the initial filing requirement would leave operators with only 16 days from the date of this Order to make their filings. Consequently, in order to give operators the full 30 days to make their initial filings, we hereby waive the requirement under 47C.F.R. § 76.987(g) that filings be made by March 23, 1995, and instead require that operators make their initial filings under 47 C.F.R. § 76.987(g) by April 4, 1995.

IV. Filing Requirements for NPTs

4. We also take this opportunity to respond to National Cable Television Association's ("NCTA") request for clarification of a la carte packages subject to treatment as NPTs.[9] NCTA contends that the filing requirements should not extend to packages consisting solely of traditional premium packages. It argues that such an application would be burdensome on operators and would inundate the Commission with materials that would serve no public interest purpose.[10]

5. A la carte packages offered prior to April 1, 1993 are not treated as NPTs.[11] We have previously exempted these packages from regulation because we wanted to avoid elimination of discounts that were available to consumers and were not established to evade rate regulation.[12] Similarly, we believe that a la carte packages consisting wholly of channels offered on an a la carte basis prior to April 1, 1993 should not be subject to the NPT filing requirement. These channels' status as a la carte on April 1, 1993 indicates that the operator had not removed them from

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[1] *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-286, 10 FCC Rcd 1226 (1994).

[2] *Sixth Reconsideration Order* at para. 22; 47 C.F.R. § 76.987.

[3] Twice previously we had addressed this issue. *See Report and Order and Further Notice of Proposed Rulemaking*, MM Docket 92-266, FCC 93-177, 8 FCC Rcd 5631, 5836-38 (1993) (*"Rate Order"*); *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119, 4212-19 (1994) (*"Second Reconsideration Order"*).

[4] *Sixth Reconsideration Order* at para. 51; 47 C.F.R. § 76.986. A la carte packages offered prior to April 1, 1993 are not treated as NPTs, and indeed are subject to no Commission requirements. *Second Reconsideration Order*, 9 FCC Rcd at 4214 n.263; *Sixth Reconsideration Order* at para. 51.

[5] 47 C.F.R. § 76.987(g).

[6] *Id.*

[7] *Public Notice*, Questions and Answers on Cable Television Rate Regulation, p.3 (Dec. 29, 1994).

[8] 47 C.F.R. § 76.987(g).

[9] *See* Letter from NCTA to Meredith Jones, FCC (January 24, 1995).

[10] *Id.*

[11] *Second Reconsideration Order*, 9 FCC Rcd at 4214 n.263; *Sixth Reconsideration Order* at para. 51.

[12] *Sixth Reconsideration Order* at para. 41.

tiered service in an attempt to evade rate regulation. Moreover, this interpretation is consistent with our position in the *Sixth Reconsideration Order* that "there are sound policy reasons to treat as reasonable any price offered for a package of channels that traditionally have been offered on a per-channel basis. Indeed, we cannot envision circumstances in which any price of a collective offering such as the commonly offered HBO/Showtime' package would be found to be unreasonable."[13] We therefore grant NCTA's request that packages of a la carte channels consisting wholly of channels offered on an a la carte basis prior to April 1, 1993 are not subject to the reporting requirements discussed above. It is not necessary that the package itself was offered prior to April 1, 1993.

6. Additionally, we have stated that promotional offerings are permissible with respect to regulated services.[14] Operators are not restricted in their promotional offerings of regulated services, other than by the requirements that they be universally offered and of limited duration.[15] Since there is no filing requirement on promotional offerings of regulated programming, it would be inconsistent to impose filing requirements on promotional offerings of unregulated packages. Accordingly, promotional rates and promotional packages of NPTs are not subject to the NPT reporting requirement.

V. ORDERING CLAUSE

7. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] *Sixth Reconsideration Order* at para. 51.
[14] *Rate Order*, 8 FCC Rcd at 5897.
[15] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company and
New England Telephone and
Telegraph Company

Petition for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 20, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Special Access Expanded Interconnection Order*, the Commission required most Tier 1 local exchange carriers (LECs) to permit competitors and access customers to terminate their own special access[1] transmission facilities at LEC central offices and to interconnect with LEC special access services.[2] In particular, the Commission required LECs to provide physical collocation, except under limited circumstances for which LECs were permitted to seek exemption from the physical collocation requirement.[3] In the *Special Access Expanded Interconnection Order* the Commission required LECs to apply nonrecurring reconfiguration charges in a neutral manner that would not differentiate charges based on whether the customer chooses to use interconnector or LEC facilities for special access service unless there are specific, identifiable cost differences.[4] Reconfiguration charges are imposed when a customer shifts between DS1 special access service and DS3 service,[5] or replaces its LEC-provided special access service with a service provided by a competitive access provider (CAP).

2. On September 2, 1993, the Commission adopted the *Second Reconsideration Order* in that docket,[6] which clarified this requirement. Specifically, nonrecurring charges (NRCs) applicable when a customer shifts to an interconnector's services must be set no higher than cost-based levels.[7] In addition, any difference between the NRCs applicable when a customer shifts to an interconnector's services and those applicable when a customer reconfigures its service, but remains on the LEC network, must be cost-based.[8] The Commission also stated that the presumption of reasonableness applicable to other within-band, below-cap rate changes would not apply to revisions to NRCs associated with special access reconfigurations.[9] All LECs who had tariffed special access NRCs that were inconsistent with these requirements were ordered to file revised NRCs on or before October 18, 1993.[10] In its petition for reconsideration, NYNEX asked the Commission to "confirm" that its rate structure complied with the Commission's rules. The NYNEX tariff did not apply a NRC when customers reconfigured their services to use NYNEX facilities different from those previously used in the same central office, but did apply a NRC when customers moved their traffic from NYNEX facilities to CAP facilities.[11] The Commission determined that NYNEX's rate structure, as described in its petition for reconsideration, appeared to violate the standards set forth in the *Second Reconsideration Order*.[12] The Commission stated that it would consider waiving the

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[1] Special access service primarily involves the provision of "private lines," which are facilities or network transmission capacity dedicated to the use of an individual customer. *See* Section 69.114 of the Commission's Rules, 47 C.F.R. § 69.114.

[2] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order); recon.* 8 FCC Rcd 127 (1992); *second recon.*, 8 FCC Rcd 7341 (1993); *vacated in part and remanded sub nom.* Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. FCC); on remand* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 9 FCC Rcd 5154 (1994) (*Expanded Interconnection Remand Order*). The *Special Access Expanded Interconnection Order* excluded members of National Exchange Carrier Association (NECA) pools from this requirement. Puerto Rico Telephone Company is the only Tier 1 carrier participating in NECA pools. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7398 (para. 57).

[3] The Commission defines physical collocation as the physical placement of the interconnecting party's equipment in the LEC's central office. The Commission defines virtual collocation as a service in which the LEC provides central office transmission equipment that terminates interconnectors' circuits. The LEC owns and exercises exclusive physical control over the equipment, but the equipment is selected by the interconnector and dedicated to the interconnector's use. *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5169-70 (para. 44).

[4] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7465 (para. 203).

[5] DS1 service provides capacity equivalent to 1.544 Megabits per second (Mbps). DS3 service provides capacity equivalent to 28 DS1 circuits.

[6] Expanded Interconnection with Local Telephone Company Facilities, Second Memorandum Opinion and Order on Reconsideration, CC Docket No. 91-141, 8 FCC Rcd 7341 (1993) (*Second Reconsideration Order*).

[7] *Id.* at 7362 (para. 48).

[8] *Id.*

[9] *Id.* at 7362 (para. 49). In a companion order to the *Second Reconsideration Order*, the Commission extended the requirement to offer expanded interconnection for special access facilities to switched transport facilities. The Commission also stated that the special access NRC requirements also applied to NRCs for switched transport expanded interconnection. Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141, Transport Phase I, 8 FCC Rcd 7374, 7439 (para. 130) (1993) (*Second Report and Order*).

[10] *Second Reconsideration Order*, 8 FCC Rcd at 7363 (para. 50). LECs were also required to make any necessary revisions to their switched transport NRCs on or before November 18, 1993. *Second Report and Order*, 8 FCC Rcd at 7439 (para. 130). On October 18, NYNEX filed Transmittal No. 235 proposing to give access customers the option of paying CAP rollover charges in six monthly installments. NYNEX petition at 3-4. Transmittal 235 has since taken effect. Ameritech Operating Companies, NYNEX Telephone Companies, *et al.*, 9 FCC Rcd 970, 973 (para. 22) (Com. Car. Bur. 1994).

[11] *Second Reconsideration Order*, 8 FCC Rcd at 7361 (para. 46).

[12] *Id.* at 7363 (para. 51). Those standards are set forth in the *Second Reconsideration Order*, 8 FCC Rcd at 7362 (para. 48 and n.80), and are summarized in paragraph 1 of this Order, *supra*.

nondiscriminatory NRC requirement only if a LEC could demonstrate that any differential treatment would not undermine competition or otherwise violate the Communications Act.[13]

3. In *Bell Atlantic v. FCC*, the Court of Appeals concluded that mandatory physical collocation is a taking of property within the meaning of the Fifth Amendment, and that the Commission had no authority under the Communications Act to take property.[14] The Court vacated the Commission's physical collocation requirement, and remanded the virtual collocation provisions and other expanded interconnection rules.[15] On July 14, 1994, the Commission adopted the *Expanded Interconnection Remand Order*, which required LECs to file tariffs offering virtual collocation on September 1, 1994.[16] LECs could be exempted from this requirement, however, by choosing to continue to offer physical collocation in accordance with the expanded interconnection rules.[17] The Commission also specifically reaffirmed its policies on nonrecurring reconfiguration charges in the *Expanded Interconnection Remand Order*.[18]

4. On February 7, 1994, New York Telephone Company and New England Telephone and Telegraph Company (together, NYNEX) filed a petition for waiver of the standards governing nonrecurring charges for expanded interconnection services established in the *Special Access Expanded Interconnection Order*.[19] Five parties filed oppositions to or comments on NYNEX's petition,[20] and NYNEX filed a reply. For reasons discussed below, we grant NYNEX's petition, subject to the conditions specified below.

II. PLEADINGS

A. Petition

5. NYNEX states that its current reconfiguration charge for shifting traffic from DS1 to DS3 facilities for customers remaining on its network is zero, while the charge for shifting a customer's traffic from NYNEX's network to an expanded interconnection multiplexing node is $285.00.[21] NYNEX permits access customers to pay this rollover charge in six monthly installments, a change it made after the *Second Reconsideration Order*.[22] NYNEX maintains that its NRCs comply with the *Second Reconsideration Order*, but seeks a waiver of that Order to the extent it is necessary.[23] NYNEX claims that it eliminated its DS1-to-DS3 reconfiguration charge to encourage customers to switch to fiber-based services, which NYNEX believes are less costly to provide and maintain.[24] NYNEX also asserts that its $285 rollover charge, imposed when a customer switches from NYNEX to interconnector facilities, is cost-based.[25] NYNEX admits, however, that there is no difference in the costs of performing the work associated with CAP rollovers and LEC reconfigurations.[26]

6. According to NYNEX, setting CAP rollover charges at zero, or setting LEC reconfiguration charges equal to CAP rollover charges, would give interconnectors an unfair competitive advantage.[27] NYNEX contends that it has faced competition from CAPs since 1985. NYNEX also asserts that, although its region represents only 10 percent of nationwide LEC revenues, its region represents 50 percent of the revenues of MFS and Teleport.[28] NYNEX further explains in an *ex parte* statement that NYNEX started to offer intrastate physical collocation voluntarily in 1990, and this has allowed CAPs to establish more collocated premises in the NYNEX region than in any other region, and to achieve greater market penetration.[29] According to NYNEX, the areas where CAPs provide service generate 35 percent of NYNEX's business and access revenues in New York and 28 percent of NYNEX's business and access revenues in Massachusetts. In New York City, NYNEX claims that CAPs have gained as much as 40 percent of the high capacity special access market in the offices where they are interconnected. NYNEX states that more carriers have been certificated to provide local telephone service in New York State than in any other state. NYNEX notes that CAPs are collocated in 10 of the 11 central offices below 59th Street in Manhattan.[30] NYNEX further reports that it has connected more than 100 DS1 switched access circuits to CAP facilities collocated in NYNEX offices in New York, and it received orders to disconnect 32 percent of its switched access trunks below 59th street and to rearrange those circuits to collocated CAPs. NYNEX argues that it must be permitted to waive its NRCs to meet competition from CAPs who waive their NRCs.[31]

7. NYNEX argues that although it does not charge explicitly NYNEX customers for reconfiguration costs, it effectively recovers these costs over time through the revenues it receives from recurring rates for the service ordered by the NYNEX customer. This practice reduces NYNEX's profit margins for the service for the period of time until the nonrecurring costs are recovered.[32] NYNEX argues that it cannot recover the nonrecurring costs associated with rollovers through recurring charges because it derives no recurring revenues from circuits that have been rolled over to a collocator. NYNEX acknowledges that it does collect expanded interconnection recurring rates from

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[13] *Id.* at 7363 (para. 51).
[14] *Bell Atlantic v. FCC*, 24 F.3d at 1445-47.
[15] *Id.* at 1447.
[16] *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5167 (para. 36).
[17] *Id.*
[18] *Id.* at 5210-11 (para. 212).
[19] *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7465 (para. 203).
[20] These parties are: Teleport Communications Group (Teleport); MCI Telecommunications Corporation (MCI); Local Area Telecommunications, Inc. (LOCATE); MFS Communications Company, Inc. (MFS); and Southwestern Bell Telephone Company (Southwestern Bell).
[21] NYNEX Petition at 2. In its waiver, NYNEX refers to moves from one LEC facility to another LEC facility as "reconfigurations," and refers to moves from LEC facilities to interconnector facilities as "rollovers." For purposes of this Order, we use NYNEX's terminology, and refer to moves to CAP facilities as "CAP rollovers."
[22] *Id.* at 3-4.
[23] *Id.*at 2-3.
[24] *Id.* at 3.
[25] *Id.* at 3-4. NYNEX states that this NRC is applicable to both special access and switched transport rollovers. *Id.*
[26] *Id.* at 4 n.8.
[27] *Id.* at 4-5.
[28] *Id.* at 5 n.9.
[29] Letter from Dee May, Director, Federal Regulatory Issues, NYNEX, to Acting Secretary, Federal Communications Commission, July 29, 1994 (*July 29 Letter*), at 2.
[30] *Id.* at 2-3.
[31] *Id.* at 3.
[32] NYNEX Petition at 5.

collocators, but asserts that it cannot recover the costs of a CAP rollover through these rates because they must be set at cost.[33] NYNEX also asserts that if it must impose a CAP rollover charge of zero, it would be unable to recover its own costs associated with the rollover, while the collocator would not bear any rollover costs. At the same time, NYNEX also asserts that it would be disadvantaged if it must impose a nonrecurring charge for LEC reconfigurations, because, it claims, interconnectors often recover nonrecurring costs from their customers gradually through recurring rates, or even waive installation charges. NYNEX claims that there is substantial evidence that CAPs are, in fact, waiving nonrecurring charges to their customers.[34]

B. Comments

8. A number of parties assert that NYNEX has not shown special or "unique circumstances that would warrant a waiver.[35] LOCATE maintains that NYNEX should have filed a petition for rulemaking rather than a waiver petition.[36] LOCATE and MFS contend that the Commission considered and rejected arguments for the rate structure contemplated in NYNEX's waiver petition in the *Second Reconsideration Order*.[37] They then argue that granting NYNEX's petition would prejudge an issue designated in the expanded interconnection investigation.[38] Teleport notes that the Commission stated it would consider waivers of the nondiscriminatory NRC requirement only if granting the waiver would not be anticompetitive or otherwise violate the Communications Act.[39]

9. Several parties also argue that if granted, NYNEX's waiver request would permit unreasonably discriminatory rates in violation of Section 202 of the Communications Act, 47 U.S.C. § 202, because a charge would apply when access customers move from NYNEX to CAP facilities, but not when they move from CAP to NYNEX facilities.[40] These parties maintain that there are no cost differences between performing work associated with CAP rollovers and LEC reconfigurations.[41] LOCATE and Teleport argue that recovering nonrecurring costs through recurring rates cannot justify otherwise discriminatory rates.[42] LOCATE maintains that NYNEX's rate structure is discriminatory because nonrecurring costs are recovered from NYNEX customers gradually through recurring rates, while nonrecurring costs are recovered from CAP customers in one up-front payment.[43] MFS contends that recovering nonrecurring costs through recurring rates is an improper bundling of services in violation of Sections 61.40(a)(1) and 69.114(a) of the Commission's Rules, 47 C.F.R. §§ 61.40(a)(1), 69.114(a).[44] MFS and LOCATE also maintain that this bundling makes it difficult to determine whether NYNEX's NRCs are set at cost-based levels.[45] Teleport observes that even after a customer rolls over from NYNEX's network to Teleport's network, NYNEX still imposes special access channel termination charges and multiplexer charges on the end user.[46] Teleport asserts that NYNEX could use these revenues to offset its costs if NYNEX waived its CAP rollover NRCs, just as it uses revenues for the services provided after a LEC reconfiguration to recover the nonrecurring costs of the LEC reconfiguration.[47] Teleport argues that, under price cap regulation, LECs do not recover specific costs from specific rates, and thus NYNEX cannot claim that it is recovering nonrecurring costs through recurring rates from its customers.[48] MCI argues that it might be reasonable for NYNEX to recover these nonrecurring costs through recurring rates, because the public interest is served by encouraging access customers to upgrade to newer technologies.[49]

10. Teleport discounts NYNEX's argument that NYNEX is forced by competitive pressure to waive its installation NRCs. Teleport believes its own waiver of its installation charge is distinguishable from NYNEX's waiver because Teleport's waiver is designed to attract new customers while NYNEX's waiver is designed to keep existing customers. Teleport maintains that it must often waive installation charges to attract customers, because NYNEX customers incur no NRC if they remain with NYNEX.[50] MCI argues that NYNEX waives its reconfiguration NRCs

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[33] *Id.* at 5-6.

[34] *Id.* at 6-8 and Att. A (CAP advertisements of free installation or free service for an initial period).

[35] MFS Opposition at 2-3, *citing* Petitions for Waivers of Various Sections of Part 69 of the Commission's Rules, 104 FCC 2d 1132, 1158 (1986), *recon. denied*, 2 FCC Rcd 28 (1987) (*Various Waivers Order*), WAIT Radio v. FCC, 418 F.2d 1135, 1159 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972) (*WAIT Radio*), and BellSouth's Petition for Declaratory Ruling, or Alternatively, Request for Limited Waiver of the CPE Rules, 6 FCC Rcd 3336, 3343 (1991) (*BellSouth CPE Waiver Order*); LOCATE Opposition at 2; MCI Opposition at 3-4, *citing WAIT Radio*, Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*), and Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970).

[36] LOCATE Opposition at 2.

[37] *Id.* at 3; MFS Opposition at 4-5, *citing Second Reconsideration Order*, 8 FCC Rcd at 7363.

[38] MFS Opposition at 5; LOCATE Opposition at 3. We note here that this issue was not designated in the special access expanded interconnection investigation. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, 8 FCC Rcd 6909 (Com. Car. Bur. 1993) (*Special Access Designation Order*). Although some parties raised this issue in petitions to reject or suspend and investigate the switched transport expanded interconnection tariffs, the Commission has not yet designated issues for investigation in that proceeding. *See* Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport, 9 FCC Rcd 817, 822 (para. 10) (Com. Car. Bur. 1994).

[39] Teleport Opposition at 2, *citing Second Reconsideration Order*, 8 FCC Rcd at 7363 (para. 51).

[40] MFS Opposition at 3-4. *See also* Teleport Opposition at 1 (NYNEX's rates would be unreasonably discriminatory for this reason.)

[41] LOCATE Opposition at 3-4; MFS Opposition at 3-4; Teleport Opposition at 1-2, 5-6.

[42] LOCATE Opposition at 5; Teleport Opposition at 6.

[43] LOCATE Opposition at 4-5.

[44] MFS Opposition at 5-6.

[45] *Id.* at 6; LOCATE Opposition at 5.

[46] Channel termination charges recover the costs associated with the facilities from the local end office to the customer's premises. Multiplexer charges recover the costs associated with multiplexers, which connect facilities using different transmission speeds.

[47] Teleport Opposition at 7. *See also* Teleport *ex parte* statement of May 16, 1994.

[48] *Id.* at 6-7.

[49] MCI Opposition at 4-5.

[50] Teleport Opposition at 3-5. *See also* LOCATE Opposition at 4-5.

because it benefits when interexchange carriers move from DS1 to DS3 circuits. According to MCI, such reconfigurations give NYNEX fewer circuits to maintain, and those circuits employ newer technologies that are less costly to maintain.[51] Repeating the arguments made in its petition to reject NYNEX's special access expanded interconnection tariff, MFS denies that NYNEX's expanded interconnection rates are cost-based. Thus, MFS rejects NYNEX's assertion that it cannot waive CAP rollover NRCs because its expanded interconnection charges are cost-based.[52]

11. Southwestern Bell argues that the rate structure proposed in NYNEX's waiver petition is reasonable, because the relevant costs of CAP rollovers and LEC reconfigurations would be recovered from the respective cost-causers.[53] Southwestern Bell also argues that it would be arbitrary and capricious to preclude NYNEX from waiving installation charges when its competitors do.[54]

C. Reply

12. NYNEX replies that it has provided good cause for waiver, because it faces more competition from CAPs than do LECs in other parts of the country. Therefore, NYNEX asserts that it should be permitted to use the rate structure used by its competitors.[55] According to NYNEX, this rate structure would not be discriminatory because it is the same rate structure used by its competitors.[56] Further, NYNEX asserts that because access customers are permitted to pay CAP rollover charges in six monthly installments without interest, CAP customers can pay nonrecurring charges over time in the same manner as NYNEX's customers.[57] In response to MCI's argument that it may be reasonable to recover nonrecurring costs through recurring charges in this case, NYNEX states that it is willing to consider recovering these costs through some other expanded interconnection recurring rate element if the Commission would allow it.[58] Finally, NYNEX maintains that Teleport's recommendation of offsetting nonrecurring rollover costs with recurring revenue from the terminating services connected to the collocation arrangement amounts to a cross-subsidy from other services to rollovers.[59]

III. DISCUSSION

13. The Commission may exercise its discretion to waive a rule where there is "good cause" to do so,[60] because the particular facts would make strict compliance inconsistent with the public interest.[61] Waiver is thus appropriate only if special circumstances warrant a deviation from the general rule and such a deviation will better serve the public interest than adherence to the general rule.[62] Further, the Commission's grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[63] In evaluating the public interest, the Commission stated in the *Second Reconsideration Order* that it would consider waiving the NRC standards established in that Order only if the differential treatment resulting from the waiver would not undermine competition or otherwise violate the Communications Act.[64] For the reasons stated below, we find that NYNEX has made the required showing.

14. NYNEX has shown that it faces special circumstances relating to the extent of competition it faces in its region. While we lack sufficient data to reach conclusive findings regarding competition in the rapidly-changing access marketplace in the NYNEX region, NYNEX has provided sufficient evidence to convince us that special circumstances exist to justify this specific limited waiver, as conditioned below. Specifically, NYNEX has demonstrated that CAPs have been operating in the New York Telephone region for a substantial period of time.[65] NYNEX voluntarily decided to offer physical collocation in 1990, and as explained above, this has allowed CAPs to establish more collocated premises in the NYNEX region than in any other region, and to achieve greater market penetration.[66] In particular, NYNEX submits that CAPs have gained 40 percent of the high capacity special access market in the New York City central offices in which they are located,[67] which are generally Zone 1 central offices.[68] Furthermore, according to NYNEX, CAPs are located in 10 of the 11 central offices below 59th Street in Manhattan.[69] In addition, NYNEX reports that it has received orders to disconnect 32 percent of its switched access trunks below 59th street and to rearrange those circuits to collocated CAPs.[70] We therefore conclude, for the geographic area identified below, that NYNEX has met its burden of demonstrating that it faces a special circumstance under our waiver standards.

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51 MCI Opposition at 4.
52 MFS Opposition at 7-8.
53 Southwestern Bell Comments at 2.
54 *Id.* at 2-3.
55 NYNEX Reply at 3.
56 NYNEX Reply at 4.
57 *Id.* at 4-5.
58 *Id.* at 5.
59 *July 29 Letter* at 2.
60 *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.
61 *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).
62 *Id.* at 1157; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
63 *Northeast Cellular*, 897 F.2d at 1166.
64 *Second Reconsideration Order*, 8 FCC Rcd at 7363 (para. 51). Those standards are set forth in the *Second Reconsideration Order*, 8 FCC Rcd at 7362 (para. 48); and summarized in paragraph 2 of this Order, *supra*.
65 NYNEX Petition at 5 n.9.
66 *July 29 Letter* at 2-3.
67 *Id.* at 2.
68 In the *Special Access Expanded Interconnection Order*, the Commission permitted LECs to establish traffic density-related rate zones to bring special access rates more in line with costs, and to give LECs flexibility in responding to competition. *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7454 (para. 179). The Commission did not limit the number of zones, but stated it would subject a LEC's zone density plans to increased scrutiny if that LEC attempted to establish more than three zones. *Id.* at 7454 n.413. NYNEX's zone density plan was approved in June 1993. BellSouth Telecommunications, Inc., *et al.*, 8 FCC Rcd 4443 (Com. Car. Bur. 1993).
69 *July 29 Letter* at 3.
70 *Id.*

15. The Commission stated that it will consider a waiver of the NRC standards to be in the public interest only if the differential treatment resulting from the waiver would not undermine competitionor otherwise violate the Communications Act.[71] Because CAPs have a significant presence in NYNEX's Zone 1 central offices in New York, it does not appear that NYNEX's waiver, as conditioned below, would undermine nascent competition. As explained below, NYNEX will recover nonrecurring costs over time from both NYNEX customers and CAP customers. Thus, the difference between the treatment given to NYNEX customers and the treatment given to CAP customers will be minimal. For this reason, it seems unlikely that NYNEX's rate structure will undermine competition.

16. We disagree with LOCATE and MFS that there are no relevant differences between the rate structure NYNEX proposed in the *Second Reconsideration Order* and the rate structure it proposes here. In the *Second Reconsideration Order,* NYNEX did not apply a NRC when customers reconfigured their services from facilities previously used in the same central office to NYNEX facilities, but did apply a NRC when customers moved their traffic from NYNEX facilities to CAP facilities.[72] In its waiver petition, however, NYNEX explained that its customers do pay nonrecurring costs when they move their traffic from CAP facilities to NYNEX facilities, but those costs are bundled into recurring rates and recovered over time. By permitting customers moving from NYNEX facilities to CAP facilities to pay nonrecurring charges in monthly installments, nonrecurring costs are recovered over time from both NYNEX customers and CAP customers. Therefore, the rate structure in NYNEX's waiver request is distinguishable from the rate structure the Commission rejected in the *Second Reconsideration Order*. Given the extent of competition in Zone 1 of New York, we conclude that this rate structure is not likely to harm competition significantly.

17. While we conclude that the apparent extent of competition in NYNEX's Zone 1 New York central offices justifies this waiver, we do not believe that a waiver should apply outside New York State, or even outside the Zone 1 offices in New York. NYNEX's description of increased competition in its area seems to focus specifically in New York City, or particularly in Manhattan south of 59th Street.[73] There is no evidence in the record before us in this proceeding that the competition NYNEX faces outside its Zone 1 central offices in New York is as substantial as the competition it faces in Zone 1. Accordingly, we conclude that NYNEX has not shown good cause for waiver at central offices outside Zone 1.

18. Although, as explained above, it appears that granting NYNEX a waiver would not undermine competition, the public interest would be best served by placing some additional conditions on NYNEX's waiver. Under a waiver of limited duration, we can observe whether the waiver we now grant affects the development of competition in NYNEX's region. We grant NYNEX's waiver petition only for one year following the release date of this Order. If NYNEX's rate structure has some unreasonably anticompetitive effects, we can limit further or rescind NYNEX's waiver before any serious damage to competition occurs. Although NYNEX has shown that it recovers nonrecurring costs over time from both NYNEX customers and CAP customers, it is not clear from the record before us whether the six month period given to CAP customers is comparable to the time over which nonrecurring costs are recovered from the recurring rates paid by the NYNEX customers. Therefore, NYNEX's waiver will be conditioned on it permitting CAP customers to pay the CAP rollover NRC over 12 months.

19. If NYNEX desires to continue to recover its reconfiguration costs through recurring charges after this waiver of the expanded interconnection NRC standard expires, it must obtain another waiver. If NYNEX decides to seek such a waiver, it should file its petition no later than nine months from the release date of this Order. NYNEX must show in that petition that competition in its region has not been undermined by its NRC rate structure.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the petition for waiver filed by New York Telephone Company and New England Telephone and Telegraph Company IS GRANTED, subject to the conditions described above.

21. IT IS FURTHER ORDERED that New York Telephone Company and New England Telephone and Telegraph Company SHALL FILE, no later than 10 days from the release date of this Order, on not less than 15 days' notice, tariff revisions that comply with the conditions placed on its waiver as described above.

22. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59. New York Telephone Company and New England Telephone and Telegraph Company should cite the "DA" number of the instant Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[71] *Second Reconsideration Order*, 8 FCC Rcd at 7363 (para. 51). Those standards are set forth in the *Second Reconsideration Order*, 8 FCC Rcd at 7362 (para. 48); and summarized in paragraph 2 of this Order, *supra*.

[72] *Second Reconsideration Order*, 8 FCC Rcd at 7361 (para. 46).

[73] *July 29 Letter* at 2-3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MetroVision, Inc. CUID Nos. TX0079 (Belton, TX)
TX0080 (Copperas Cove, TX)
TX0232 (Temple, TX)

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1995; Released: March 7, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices MetroVision, Inc. ("MetroVision"), through its subsidiary companies as shown on Appendix A, was charging for its Cable Program Service ("CPS") Tier in the communities designated by the CUID numbers referenced above and on Appendix A. MetroVision has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of MetroVision's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on MetroVision and filed with the Commission as set forth in Appendix A.

5. MetroVision attempted to justify its CPS prices through Forms 393 filed and amended[11] on the dates set forth on Appendix B.

III. DISCUSSION

6. MetroVision asserts that its monthly CPS tier prices per subscriber are justified by its benchmark filings because its prices are equal to or below the maximum permitted charges as calculated in its filings. Upon review of MetroVision's Forms 393, we have found no apparent errors that would require a recalculation of MetroVision's maximum permitted CPS prices.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that MetroVision has demonstrated that its CPS tier prices (plus franchise fee) as shown on Appendix C were equal to or below the maximum permitted prices for the CPS tier for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent MetroVision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which MetroVision implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* 9 FCC Rcd at 4189 n.195.

[11] MetroVision amended its FCC Forms 393 in response to an Order citing common deficiencies observed in benchmark filings generally. *See Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of MetroVision listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This

programming service prices charged by MetroVision, Inc. and its subsidiary companies, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by MetroVision, Inc. and its subsidiary companies (as shown on Appendix B) with respect to the franchise areas referenced on Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for MetroVision's Cable Programming Service Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

First Valid 329s Filed with the FCC

MetroVision, Inc. d/b/a Temple Cablevision

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
TX0079	11-09-93	11-05-93

MetroVision, Inc. d/b/a Killeen Cablevision

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
TX0080	10-15-93	10-11-93

MetroVision, Inc. d/b/a Cablevision Investors, Inc.

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
TX0232	10-13-93	10-08-93

Appendix B

Initial and Amended Form 393 Filings

MetroVision, Inc. d/b/a Temple Cablevision

CUID	Initial Form 393 Filing	Amended Form 393 Filing(s)
TX0079	11-12-93	6-23-94

MetroVision, Inc. d/b/a Killeen Cablevision

CUID	Initial Form 393 Filing	Amended Form 393 Filing(s)
TX0080	11-12-93	6-23-94

MetroVision, Inc. d/b/a Cablevision Investors, Inc.

CUID	Initial Form 393 Filing	Amended Form 393 Filing(s)
TX0232	11-12-93	6-23-94

Appendix C

Maximum Permitted Rates

MetroVision, Inc. d/b/a Temple Cablevision

CUID No.	Cable Service
TX0079	$12.56

MetroVision, Inc. d/b/a Killeen Cablevision

CUID No.	Cable Service
TX0080	$14.44

MetroVision, Inc. d/b/a Cablevision Investors, Inc.

CUID No.	Cable Service
TX00232	$12.56

Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of Harrisonburg Harrisonburg, Virginia	CUID No. VA0035

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1995; Released: March 7, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Time Warner Cable of Harrisonburg ("Warner Cable") was charging for its cable programming service ("CPS") tier in Harrisonburg, Virginia, CUID No. VA0035. Warner Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Warner Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was completed and served on Warner Cable on October 12, 1993. The Commission received the complaint on October 20, 1993.

5. Warner Cable attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993. Warner Cable amended its justification on July 15, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. Warner Cable asserts that for CUID No. VA0035, its monthly CPS tier price of $9.78 per subscriber is justified by its benchmark filing because it is less than the maximum permitted charge of $9.94 as calculated in the filing. Upon review of Warner Cable's Form 393, we have found no apparent errors that would result in Warner Cable's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Warner Cable's showing supports a CPS tier price of $9.78 per month (plus franchise fee) for the period from October 20, 1993 to May 14, 1994 in CUID No. VA0035.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of Warner Cable listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 12, 1993 complaint against the cable programming service price charged by Time Warner Cable of Harrisonburg in Harrisonburg, Virginia, CUID No. VA0035, IS DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable of Harrrisonburg with respect to CUID No. VA0035, for the period of October 20, 1993 to May 14, 1994, justifies a price of $9.78 per month (plus franchise fee) for Warner Cable's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications Missouri City, Texas	CUID Nos. TX0613 and TX0614

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 1995; Released: March 7, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications ("Warner Cable") was charging for its cable programming service ("CPS") tier in Missouri City, Texas. CUID Nos. TX0613 and TX0614. Warner Cable has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Warner Cable's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints were served on Warner Cable by the local franchising authority on February 28, 1994.[11] The Commission received the complaints on that same date.

5. Warner Cable attempted to justify its CPS price through an FCC Form 393 filed on March 28, 1994.

III. DISCUSSION

6. Warner Cable asserts that its monthly CPS tier price of $10.63 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $10.66 as calculated in the filing. Upon review of Warner Cable's Form 393, we have found no apparent errors that would result in Warner Cable's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Warner Cable's showing supports a CPS tier price of $10.63 per month (plus franchise fee) for the period of February 28, 1994 to May 14, 1994.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaints were dated February 28, 1994 and state that they were mailed to Warner Cable on that date. Warner Cable has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 28, 1994 as the service date.

[12] This finding is based solely on the representations of Warner Cable listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 28, 1994 complaints against the cable programming service price charged by The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications in Missouri City, Texas, CUID Nos. TX0613 and TX0614, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Warner Cable with respect to CUID Nos. TX0613 and TX0614, for the period of February 28, 1994 to May 14, 1994, justifies a price of $10.63 per month (plus franchise fee) for The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communication's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEDIA GENERAL CABLE OF FAIRFAX COUNTY, INC.	Fairfax County, VA Fairfax, VA Falls Church, VA Herndon, VA Vienna, VA

Request for Stay
of Local Cable Rate Ordinances

CONSOLIDATED ORDER

Adopted: March 3, 1995; Released: March 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 16, 1995, Media General Cable of Fairfax County, Inc. ("MGC") filed a Request for Stay ("Stay Request") of several cable rate ordinances ("Ordinances") issued by its local franchising authorities in Fairfax County, Va.; the City of Fairfax, Va.; the City of Falls Church, Va.; the Town of Herndon, Va.; and the Town of Vienna, Va (collectively "Communities").[1] Fairfax County submitted a consolidated Opposition to MGC's Stay Request on February 23, 1995.

2. Fairfax County, which is coordinating its cable rate regulation efforts with the other four Communities, passed an Emergency Ordinance on October 10, 1994.[2] The Communities' Ordinances approved MGC's basic service tier rates, but recalculated and reduced MGC's regulated rates for its equipment and installations, pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").[3] The Ordinances also ordered MGC to issue refunds or credits to subscribers for those charges collected prior to July 14, 1994, which were in excess of MGC's maximum permitted equipment and installation rates.

3. On November 3, 1994, MGC filed an appeal of the Ordinances with the Commission. On the same date, MGC also filed a Request for Stay of the Ordinances pending the Commission's resolution of its Appeal of the Ordinances. In *Media General*, the Commission denied MGC's Appeal and dismissed its Request for Stay of the Ordinances.

4. In the instant Stay Request, MGC again seeks a stay of those portions of the Ordinances in which the Communities ordered MGC to refund all equipment and installation overcharges prior to July 14, 1994. MGC submits that it satisfies the legal standard for the granting of a stay and is, therefore, entitled to a stay of those portions of the Ordinances pertaining to the issuance of refunds.[4]

II. STANDARD OF REVIEW

5. The Commission evaluates petitions for stay under well settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the granting of a stay.[5] As discussed below, resolution of this stay petition centers primarily on the strength of MGC's argument regarding the third prong of this test.

III. DISCUSSION

6. The Commission's rules permit operators to implement refunds in either of the following methods: (1) by returning overcharges directly to those subscribers who actually paid the overcharges; or (2) by means of a prospective percentage reduction in the rates for the basic service tier or associated equipment for current subscribers via a specifically identified, one-time credit.[6] Thus, the Commission's rules are structured so that individuals who were actually overcharged might not receive refunds in the future. Thus, a delay in the implementation of the refunds owed by MGC will not harm any interested party, since if MGC must implement refunds, it can choose to do so by way of credits to the then-current class of subscribers. In addition, MGC has volunteered to either place in escrow a

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[1] On February 16, 1995, MGC also filed with the Commission a Petition for Review of a Consolidated Order issued by the Chief of the Cable Services Bureau, pursuant to delegated authority, on February 10, 1995. *See* Media General of Fairfax County, Inc., DA 95-201 (Cab. Serv. Bur., released February 10, 1995) (*"Media General"*). Fairfax County plans to submit an Opposition to MGC's Petition for Review on March 3, 1995. In *Media General*, the Commission denied MGC's appeal of the Communities' Ordinances. MGC now requests that the Commission stay the Communities' Ordinances pending the Commission's review of *Media General*.

[2] The Emergency Ordinance has since been supplanted by a permanent ordinance adopted by the County on October 31, 1994. Because all five of the Communities adopted the analysis performed by a consultant employed to analyze MGC's rates, the Communities all adopted virtually identical Ordinances.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] *See* paragraph 5, *infra*.

[5] *See* Wisconsin Gas Co. v. FERC, 758 F. 2d 669, 673-74 (D.C. Cir. 1985) (per curiam); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] 47 C.F.R. §76.942(d).

sufficient amount of funds or to post a bond securing the refund obligation, thus further protecting subscribers interests in the refunds ordered by the Communities.[7]

7. A stay of the Ordinances would prevent MGC from being subjected to the irreparable economic harm of issuing any refunds to subscribers that it could not later recoup. Accordingly, we will grant MGC's Stay Request, pending a review by the Commission of *Media General.*

8. During the period of this stay, MGC is ordered to deposit in an interest-bearing escrow account the total amount of money that the Communities have ordered MGC to refund to its customers for the period of time between October 10, 1993 and July 14, 1994. Alternatively, MGC may elect to post a bond for the benefit of the Communities. The amount of the bond shall be the total amount of money that the Communities have ordered MGC to refund to its customers for the period of time between October 10, 1993 and July 14, 1994, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if MGC is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the Communities, on behalf of MGC's subscribers.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Request for Stay filed by MGC is GRANTED.

10. IT IS FURTHER ORDERED that the total amount of money that the Communities have ordered MGC to refund to its customers for the period of time between October 10, 1993 and July 14, 1994 SHALL BE PLACED by MGC in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the Communities for the total amount of money that the Communities have ordered MGC to refund to its customers for the period of time between October 10, 1993 and July 14, 1994, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of MGC's compliance with this Consolidated Order shall be filed with the Commission within thirty (30) days of the release of this Consolidated Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate for tax refunds and additional tax payments.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[7] *See* Stay Request at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Columbia Cable of Michigan — CUID Nos. MI0141, MI0207, MI0355, MI0421

Ann Arbor and Brighton, Michigan Systems

Benchmark Filings To Support Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Columbia Associates d/b/a Columbia Cable of Michigan ("Columbia") was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above served by its Ann Arbor and Brighton, Michigan, systems. Columbia has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Columbia's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on Columbia and filed with the Commission as set forth in Appendix A.

5. Columbia attempted to justify its CPS prices through FCC Forms 393 filed on November 15, 1993 for CUID No. MI0421, Superior Township, Michigan; November 24, 1993 for CUID No. MI0141, South Lyon, Michigan, and CUID No. MI0355, Brighton Township, Michigan; and on December 13, 1993 for MI0207, Brighton, Michigan. Columbia filed subsequent amendments on March 9, 1994, for CUID No. MI0207, and on March 21, 1994, for CUID No. MI0421. Columbia further amended its justifications for all areas on February 23, 1995, in response to a Commission letter which requested further clarification of Columbia's showing.[11]

6. As part of its initial filings in CUID Nos. MI0207 and MI0421, and as part of its amended filing in CUID No. MI0207, Columbia filed motions to dismiss complaints in those franchise areas. Two of these motions address complaints that were returned by the Commission pursuant to 47 C.F.R. § 76.954, and the motions to dismiss were effectively granted through our earlier dismissal actions. The third motion disputes the validity of a complaint in CUID No. MI0207 that was received after the filing date of the first valid complaint listed in Appendix A. Because we have accepted the earlier complaint as properly filed, we find it unnecessary to rule on Columbia's objection to the later filed complaint.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Columbia has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Columbia implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Joseph R. Reifer, Esq., Counsel for Columbia (Feb. 13, 1995).

III. DISCUSSION

7. Columbia asserts that its monthly CPS tier prices of $11.36 per subscriber in CUID No. MI0421 and $11.46 per subscriber in CUID Nos. MI0141, MI0207, and MI0355 are justified by its benchmark filings because its prices are equal to the maximum permitted charges as calculated in the filings. Upon review of Columbia's Forms 393, we have found no apparent errors that would require a recalculation of Columbia's maximum permitted CPS prices.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Columbia has demonstrated that $11.36 (plus franchise fee) in CUID No. MI0421 and $11.46 (plus franchise fee) in CUID Nos. MI0141, MI0207, and MI0355 were the maximum reasonable CPS tier prices for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[12]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Columbia Cable of Michigan in South Lyon, Michigan, CUID No. MI0141; Brighton, Michigan, CUID No. MI0207; Brighton Township, Michigan, CUID No. MI0355; and Superior Township Michigan, CUID No. MI0421, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED that the benchmark filings submitted by Columbia Cable of Michigan with respect to South Lyon, Michigan, CUID No. MI0141; Brighton, Michigan, CUID No. MI0207; and Brighton Township, Michigan, CUID No. MI0355, for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify a maximum price of $11.46 per month (plus franchise fee) for Columbia's cable programming service tier; and that the benchmark filing submitted by Columbia Cable of Michigan with respect to Superior Township, Michigan, CUID No. MI0421, for the period from December 21, 1993 to May 14, 1994, justifies a maximum price of $11.36 per month (plus franchise fee) for Columbia's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed With FCC	Date Complaint Served
0141	10/25/93	10/20/93
0207	12/10/93	12/7/93
0355	11/19/93	9/10/93
0421	12/21/93	12/17/93

[12] This finding is based solely on the representations of Columbia listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Kansas, Inc. CUID No. KS0052
City of Salina, Kansas

TCI Cablevision of Wisconsin, Inc. CUID No. WI0329
Village of Sauk City, Wisconsin

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices TCI Cablevision of Kansas, Inc. and TCI Cablevision of Wisconsin, Inc. (collectively "TCI") were charging for their cable programming service ("CPS") tier in Salina, Kansas, CUID No. KS0052 and Sauk City, Wisconsin, CUID No. WI0329, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In these cases, TCI's rate justifications indicate that as of September 1, 1993, it only offered one tier of service in Salina, Kansas, CUID No. KS0052 and Sauk City, Wisconsin, CUID No. WI0329. The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's responses, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicate that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Kansas, Inc., in Salina, Kansas, CUID No. KS0052 and TCI Cablevision of Wisconsin, Inc., in Sauk City, Wisconsin, CUID No. WI0329, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).
[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NewChannels Corporation CUID Nos. NY1344, NY1345,
Carthage, New York System NY1346, NY1348, NY1349,
NY1418, NY1419, NY1420,
NY1421 and NY1495

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995; Released: March 3, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price NewChannels Corporation ("NewChannels") was charging for its cable programming service ("CPS") tier in its Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495. NewChannels has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of NewChannels' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint in each franchise area was completed and served on NewChannels and received by the Commission on the dates set forth in Appendix A.[11]

5. NewChannels attempted to justify its CPS price through an FCC Form 393 filed on February 14, 1994 for CUID Nos. NY1345, NY1346, NY1348, NY1418, NY1419 and NY1420; on February 15, 1994 for CUID Nos. NY1344, NY1349 and NY1495; and on February 16, 1994 for CUID No. NY1421. NewChannels amended its justification on July 5, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. NewChannels asserts that its monthly CPS tier price of $12.99 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $12.99 as calculated in its most recent amended filing, dated July 5, 1994. Upon review, however, we have determined that NewChannels has not correctly calculated

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent NewChannels has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which NewChannels implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in NewChannels' price for the period after May 14, 1994 may be required to reflect the fact that NewChannels' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider the mailing dates furnished by the complainants as the service dates.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

its maximum permitted price, and it is therefore appropriate to make the following adjustments to New Channels' calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, NewChannels did not correctly account for its income tax expense. By placing entries in these columns, NewChannels confirms that it is a tax-paying entity (i.e., a "C" corporation). However, NewChannels incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. NewChannels calculated the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 as of the end of September 1993 using data released by the U.S. Department of Commerce on December 1, 1993. However, NewChannels incorrectly entered on Line 125 that 9 months, rather than 12 months, had passed between the end of the third quarter of 1992 and the third quarter of 1993. New Channels' calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which NewChannels filed.[14] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date NewChannels used in justifying its rates.

7. The cumulative effect of these adjustments is to reduce the maximum permitted monthly price for the CPS tier from $12.99 to $12.88.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that NewChannels' showing supports a maximum reasonable CPS tier price of $12.88 per month (plus franchise fee) for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A) to May 14, 1994."[15] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

9. We further conclude that NewChannels must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that NewChannels' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to NewChannels' price for the period after May 14, 1994 upon completion of our review of NewChannels' FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced in Appendix A against the cable programming service price charged by NewChannels Corporation in its Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation with respect to its Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, for the period from the first filing of the first valid complaint in each franchise area (as set forth on Appendix A) to May 14, 1994, justifies a maximum price of $12.88 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that NewChannels Corporation shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that NewChannels Corporation shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

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[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed NewChannels' FCC Form 1200 rate filing and confirmed that NewChannels calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMMONS COMMUNICATIONS, INC.

Appeal of Local
Rate Order of City of
Burbank, CA.;

Appeal of Local
Rate Order of City of
Glendale, CA.

CONSOLIDATED ORDER

Adopted: February 9, 1995; Released: February 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, the Commission consolidates and resolves two separate appeals of local cable rate orders filed by Sammons Communications, Inc. ("Sammons"). The first appeal involves the local rate order issued by the City of Burbank, California on April 5, 1994 and was filed on May 5, 1994. The second appeal involves the local rate order issued by the City of Glendale, California on April 18, 1994 and was filed on May 18, 1994.[1] In preparing this order, the Commission has reviewed all of the pleadings filed in each appeal and determined that the proceedings are sufficiently similar to justify the joint resolution of all of the issues raised by each party in a single consolidated order. We find that this consolidation will not prejudice any of the parties and will serve the interests of administrative efficiency.

2. In addition to its appeal of the two local cable rate orders, Sammons filed on May 5, 1994, a Request for Stay of the local rate order adopted on April 5, 1994, by its local franchising authority, the City of Burbank. Sammons also filed on May 18, 1994, a Request for Stay of the local rate order adopted on April 18, 1994, by its local franchising authority, the City of Glendale. We granted both stay requests.[2]

3. Each of the local rate orders establishes a new regulated rate schedule for Sammons' basic service tier rates and associated equipment.[3] Specifically, each city's local rate order requires Sammons to implement certain rate reductions and to issue refunds to subscribers for charges levied beginning on September 1, 1993.[4]

4. In the Cities' review of Sammons' Form 393, they approved its proposed maximum permitted rates for the basic service tier. The Cities, however, disapproved Sammons' proposed Hourly Service Charge ("HSC") and its proposed charges for equipment used to receive the basic service tier. The Cities then prescribed rates for the HSC and equipment. Finally, the Cities ordered Sammons to issue a refund to subscribers. Sammons argues that the Cities misapplied the Commission's rate regulations and improperly reduced Sammons' regulated revenues by setting its rates for equipment and installation below the permitted levels and by imposing a greater refund liability than is allowed under our rules. In the case of the HSC, Sammons also argues that the Cities improperly rejected its calculations, because they did not affirmatively demonstrate that Sammons' proposed rate was unreasonable and did not demonstrate that the prescribed rate is reasonable.

5. In response, the Cities maintain that they properly applied the Commission's regulations in their rate orders. The Cities assert that Sammons' basic service tier rate on the effective date of rate regulation was below its permitted benchmark rate and should have been frozen at that lower rate without any adjustment, including an adjustment related to installation or equipment charges. The Cities also argue that, in spite of repeated requests by them for verifiable information, Sammons failed to satisfy its burden of proof as to the reasonableness of its HSC. Therefore, the Cities claim that they were justified in prescribing an HSC, and that the prescribed HSC is reasonable and appropriate.

6. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising

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[1] Sammons addresses the same issues and relies on substantially the same arguments in each appeal. Likewise, the cities of Burbank and Glendale (collectively "the Cities") have filed substantially similar oppositions.

[2] *See Order* (Petition for Stay of Local Rate Order adopted by the City of Burbank, CA.), DA 94-515, 9 FCC Rcd 2518 (1994); and *see Order* (Petition for Stay of Local Rate Order adopted by the City of Glendale, CA.), DA 94-825, 9 FCC Rcd 3659 (1994).

[3] At the request of the two cities, Sammons submitted a single Form 393, reflecting rates and charges for Sammons' system which serves both cities. The two cities held separate public hearings and made separate rate decisions. However, the two cities jointly contracted with the same consulting firm, Telecommunications Management Corporation, to review the FCC Form 393 submitted by Sammons. We note that our rules permit communities that are served by the same system to make arrangements to share the cost of data collection (*e.g.*, hiring an independent consulting firm to review the Form 393 submitted by an operator) and to make independent rate decisions. *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5688 (1993) (*"Report and Order"*).

[4] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[5] 47 C.F.R. § 76.944.

[6] *See Report and Order*, at 5731; Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316; 4346 (1994) (*"Third Recon. Order"*).

[7] *Third Recon. Order*, at 4346.

authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

II. DISCUSSION

A. Refund Offsets

7. FCC Form 393 is the official form used by regulators to determine whether a cable operator's rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[9] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

8. The operator's maximum permitted rates are derived by completing Parts II and III of Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[10] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual costs and are calculated in Part III of Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required under the 1992 Cable Act.[11] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[12]

9. On the Cover Sheet (Part I) of its Form 393, Sammons' maximum permitted rate for its basic service tier is listed as $10.74 per month, while its actual rate is listed as $9.65 per month. The maximum permitted rate for Sammons' remote controls is listed on its Form 393 as $0.39 per month, while its actual rate is listed as $0.48 per month. In their respective rate orders, the Cities' prescribed rate for Sammons' remote controls is $0.29 per month. Sammons' maximum permitted rate for converter boxes is listed as $2.72 per month for type 1 and $2.21 for type 2, while its actual rate is $1.90 and $2.38, respectively. The Cities' prescribed rate for Sammons' converter boxes is $1.39 per month for type 1 and $1.68 per month for type 2. While the Cities approved Sammons' proposed maximum permitted rate for the basic service tier, it prescribed reduced rates for related equipment, which are lower than the maximum permitted level.

10. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.[13] Thus, if the Cities do not dispute either the validity of the figures used in Sammons' Form 393 or the accuracy of the calculations in the form, they should allow Sammons to charge its maximum permitted rates, as derived by the Form 393. The Cities are instructed to follow the guidelines laid out in this decision in rendering its determinations.

11. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[14] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[15] If the operator's aggregate revenues computed from its permitted rates ex-

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[8] *Id.*

[9] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[10] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[11] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[12] If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

[13] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[14] *See* 47 C.F.R. § 76.942.

[15] *See Third Recon. Order*, at 4353 ("Although maximum permitted rates are always determined in an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between

ceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Sammons should be calculated based on this method.

12. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[16] In this case, the Cities have directed Sammons to charge less than its maximum permitted levels for certain components of its regulated equipment and installation service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We find that the Cities may not order Sammons to set its equipment and installation rates below maximum permitted levels. Further, the Cities must offset or reduce any refunds they may order by the difference between the actual equipment and installation rates that Sammons charged and the maximum permitted rates that it could have charged during the applicable period of review.[17] We are remanding this case to the Cities so that they can reconsider their respective rulings in a manner consistent with our findings.[18]

B. Hourly Service Charge

13. The Cities rejected Sammons' proposed HSC[19] of $71.25 and prescribed an HSC of $22.35.[20] The Cities assert that they prescribed the HSC after Sammons failed to meet its burden of proof in justifying its proposed rate. The Cities further assert that they repeatedly invited Sammons to provide additional supporting data for its proposed HSC, but that Sammons only provided generalized data and assertions and not specific documentation which could justify the amount proposed. For example, the Cities requested specific documentation from Sammons relating to total labor hours for maintenance and installation of customer equipment and service, leased remotes, and converter boxes, but Sammons provided only general information based on its own unverifiable assumptions. After Sammons failed to supply the requested documentation, the Cities chose an alternate method to determine the appropriate HSC. They compared Sammons' HSC to that of similarly situated cable operators in other California communities and adjusted the rate to comply more closely with those other rates.[21] At the same time, the Cities adjusted maximum charges for leased remotes and leased converter boxes to reflect the prescribed HSC.[22] Sammons claims that the Cities failed to demonstrate why its proposed rate was unreasonable and why the prescribed rate is reasonable.

14. In rate regulation proceedings, the cable operator, not the local franchising authority, bears the burden of proving the reasonableness of all of its proposed regulated rates.[23] After providing the cable operator with an opportunity to participate in the rate review proceeding and provide documentation supporting its proposed rates, the local franchising authority is fully justified in prescribing a rate based on the best information available to it at the time it issues the order, as long as it explains why the operator's proposed rate is unreasonable and its own prescribed rate is reasonable.[24] The Cities did give Sammons a chance to participate in the rate review proceedings and provided it with several opportunities to provide information to support its proposed HSC. In addition, the Cities explained the basis for their decision that Sammons' proposed HSC was unreasonable and the basis for the prescribed rate. We will, therefore, affirm the Cities' rate orders on this issue.

III. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that the following Commission proceedings: (1) the appeal by Sammons Communications, Inc. of the local rate order adopted by the City of Burbank, California; and (2) the appeal by Sammons Communications, Inc. of the local rate order adopted by the City of Glendale, California, are consolidated into one proceeding.

16. IT IS FURTHER ORDERED that Sammons Communications, Inc.'s appeal of the City of Burbank's local rate order and its appeal of the City of Glendale's local rate order, regarding the issue of Sammons Communications, Inc.'s permitted charges for certain equipment and installation provided by Sammons and related refunds ARE REMANDED to the respective local franchising authorities for resolution in accordance with the terms of this Consolidated Order.

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old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[16] *See Report and Order*, at 5731; *Third Recon. Order*, at 4346.

[17] *See Third Recon. Order*, at 4353.

[18] *See* TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY), DA 94-1479 (Cab. Serv. Bur., released December 14, 1994).

[19] The HSC, which is the labor rate to be charged for services rendered by the cable operator, is computed by "taking the sum of all equipment basket costs except purchase cost of all equipment, and dividing that sum by the operator's total annual person hours dedicated to leasing, installing and equipment repair services. These estimates would be subject to verification using historical data." *Report and Order*, at 5816 n.716.

[20] *See* City of Burbank, Local Cable Rate Order, Resolution No. 24,203 (adopted April 5, 1994) (Appeal of Burbank's Local Cable Rate Order, Exhibit K); City of Glendale, Local Cable Rate Order, Resolution No. 23,052 (adopted April 18, 1994) (Appeal of Glendale's Local Cable Rate Order, Exhibit K).

[21] The Cities also found that Sammon's proposed HSC was more than double that of other systems in similar communities in the area. The Cities' consultant compared Sammons' HSC of $71.25 with the HSC calculated in other communities, and found the following: Paragon's HSC in the City of Huntington Beach, CA. is $24.06; Comcast's HSC in the City of Simi Valley, CA. is $27.90; Viacom's HSC in the City of Napa Valley, CA. is $33.40; and Colony's HSC in the City of Rancho Mirage, CA. is $28.04. *See* Appeal, Exhibit F, at 2. Furthermore, the Cities noted in their respective rate orders that, in a sample of 81 Form 393s collected from throughout the country by the National Association of Telecommunications Officers and Advisors ("NATOA"), the average hourly service charge was $26.77. According to the Cities, Sammons was provided a copy of their proposed calculations based upon an industry average prior to the public hearing, but Sammons "chose not to provide any evidence to the Cit[ies] as to the inapplicability of these reported industry averages." *See* Burbank Opposition, at 15 n.14; Glendale Opposition, at 16 n.15.

[22] The HSC impacts the cost of equipment charges, as remote control and converter box charges include a cost element of hourly rates. *See Report and Order*, at 5816-5817.

[23] *See* 47 C.F.R. § 76.937.

[24] *See Report and Order*, at 5723-5724.

17. IT IS FURTHER ORDERED that Sammons Communications, Inc.'s appeal regarding its regulated hourly service charge in the City of Glendale and the City of Burbank is DENIED.

18. IT IS FURTHER ORDERED that each of our stays of the local rate orders which were granted pending the resolution of these appeals is hereby VACATED.

19. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 17, 1995

Tariff Division Revises Pleading Cycle in US West ONA Investigation (CC Docket No. 94-128)

Pleading Cycle Revised

COMMENTS DUE: April 27, 1995
REPLIES DUE: May 12, 1995

On March 8, 1995, US West Communications, Inc. (US West) submitted its direct case in the investigation of its Open Network Architecture (ONA) tariffs initiated by the Common Carrier Bureau (Bureau) in 1994. As required by the order designating issues in this investigation, US West also submitted a report from Arthur Andersen and Co. (Arthur Andersen) on its Switching Cost Model (SCM), which US West used to develop cost support for its ONA rates. *See* Open Network Architecture Tariffs of US West Communications, Inc., CC Docket No. 94-128, 9 FCC Rcd 6710 (Com. Car. Bur. 1994) (*Designation Order*). US West submitted both a complete Arthur Andersen report, and a report in which proprietary information has been redacted.

The Bureau in the *Designation Order* scheduled comments in this investigation to be filed by April 7, 1995, and rebuttals by April 24, 1995. In this public notice, we revise that pleading cycle. Intervenors in this investigation filing comments or oppositions may do so no later than **April 27, 1995**. US West may file its rebuttal no later than **May 12, 1995**. All procedural requirements established in the *Designation Order*, 9 FCC Rcd at 6714-15, other than the scheduled dates for filing oppositions and replies, remain unchanged.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of Reston CUID No. VA0046
Reston, Virginia

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1995; Released: March 9, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Time Warner Cable of Reston ("Warner Cable") was charging for its cable programming service ("CPS") tier in the community of Reston, Virginia, CUID No. VA0046. Warner Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Warner Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Warner Cable by the County of Fairfax on October 1, 1993. The Commission received the complaint on October 5, 1993.

5. Warner Cable attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993.

III. DISCUSSION

6. Warner Cable claims that its monthly CPS tier price of $11.49 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $11.49. However, upon review we have determined that Warner Cable has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustments to Warner Cable's calculations in the Form 393:

a. Warner Cable's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) reflect 55 regulated channels and 31 satellite channels. Our examination of the channel line-up that Warner provided with its November 15, 1993 filing, however, reveals only 55 regulated channels and 29 satellite channels. Warner Cable apparently counted 2 additional satellite channels that should have been counted as either pay-per-view or premium channels. Pay-per-view and premium channels, however, may not be counted as regulated channels or as satellite channels when calculating the benchmark rates.[11] Accordingly, we reduce the number of satellite channels by two.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Warner Cable's price for the period after May 14, 1994 may be required to reflect the fact that Warner Cable's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See Instructions for Worksheet 1*, Line 121 ("For purposes of using the benchmark tables, a satellite-delivered signal' is any

b. In its Form 393 filing, Warner Cable calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993. However, the figures Warner Cable used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Warner Cable used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Warner Cable's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Warner Cable filed.[12] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Warner Cable used in justifying its rates.

7. These adjustments have the cummulative effect of reducing the maximum permitted monthly price for the CPS tier from $11.49 to $11.23.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Warner Cable's showing supports a maximum reasonable CPS tier price of $11.23 per month (plus franchise fee) for the period of October 5, 1993 to May 14, 1994 for CUID No. VA0046.[13] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Warner Cable must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Warner Cable's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to Warner Cable's price for the period after May 14, 1994, upon completion of our review of Warner Cable's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 1, 1993 complaint against the cable programming service price charged by Time Warner Cable of Reston in Reston, Virginia, CUID No. VA0046, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Time Warner Cable of Reston with respect to Reston, Virginia, CUID No. VA0046, for the period of October 5, 1993 to May 14, 1994, justifies a maximum price of $11.23 per month (plus franchise fee) for Warner Cable's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Time Warner Cable of Reston shall refund to subscribers that portion of the amounts paid for cable programming service from October 5, 1993[15] to May 14, 1994 in Reston, Virginia, CUID No. VA0046, that exceeded $11.23 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Time Warner Cable of Reston shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Time Warner Cable of Reston shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Reston, Virginia, CUID No. VA0046 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Time Warner Cable of Reston shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for Reston, Virginia, CUID No. VA0046, that reflects the reduction in the CPS rate determined in this Order.

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cable program service or super station' delivered on a communications satellite that is not a premium sevice (pay channel or pay-per-view channel)").

[12] *See* 47 C.F.R. §76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[13] This finding is based solely on the representations of Warner Cable listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed Warner Cable's Form 1200 rate filing and confirmed that Warner Cable's calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vista Cablevision Inc. CUID No. TX0483
Time Warner Cable National Division
Wichita Falls, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1995; Released: March 9, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Vista Cablevision Inc. ("Vista") was charging for its cable programming service ("CPS") tier in Wichita Falls, Texas, CUID No. TX0483. Vista has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vista's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994, forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994, through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994, through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint for the City of Wichita Falls, Texas, CUID No. TX0483, was served on Vista on September 1, 1993.[11] The Commission received the complaint on September 7, 1993.

5. Vista attempted to justify its CPS price through an FCC Form 393 filed on November 15, 1993 and re-filed an identical Form 393 on May 25, 1994. Vista amended its justification on July 7, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Vista claims that its monthly CPS tier price of $10.77 per subscriber is justified by its benchmark filings, which show a maximum permitted charge of $10.78. However, upon review we have determined that Vista has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustment to Vista's calculations in the Form 393:

a. On its Form 393 filing, Vista calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993. However, Vista's use of October 1993 as the date through which it

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vista has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Vista implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Vista's price for the period after May 14, 1994 may be required to reflect the fact that Vista's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated September 1, 1993 and states that it was mailed to Vista on that same date. Vista has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 1, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

calculated the inflation adjustment is impermissible.[13] Vista was served with a rate complaint on September 1, 1993. The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[14] Vista cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393 within this 30-day period. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[15] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Vista should have used in justifying its rates.

7. This adjustment has the effect of reducing the maximum permitted monthly price for the CPS tier from $10.78 to $10.60.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Vista's showing supports a maximum reasonable CPS tier price of $10.60 per month (plus franchise fee) for the period of September 7, 1993 to May 14, 1994 for CUID No. TX0483.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Vista must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Vista's price during the earlier period was unreasonable.[17] We reserve the right to make further adjustments to Vista's price for the period after May 14, 1994, upon completion of our review of Vista's FCC Form 1200 rate filing.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 1, 1993 complaint against the cable programming service price charged by Vista Cablevision Inc. in Wichita Falls, Texas, CUID No. TX0483, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Vista Cablevision Inc. with respect to the City of Wichita Falls, Texas, CUID No. TX0843, for the period of September 7, 1993 to May 14, 1994, justifies a maximum price of $10.60 per month (plus franchise fee) for Vista's cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vista Cablevision Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from September 7, 1993[18] to May 14, 1994 for the City of Wichita Falls, Texas, CUID No. TX0483, that exceeded $10.60 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Vista Cablevision Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vista Cablevision Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Wichita Falls, Texas, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price (plus franchise fee).

15. IT IS FURTHER ORDERED that Vista Cablevision Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for Wichita Falls, Texas, CUID No. TX0483, that reflects the reduction in the CPS rate determined in this Order.

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Meredith J. Jones
Chief, Cable Services Bureau

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[13] Furthermore, even if October 1993 were a permissible base date, Vista miscalculated the Inflation Adjustment Factor because it relied on data from inconsistent U.S. Department of Commerce releases.

[14] *See* 47 C.F.R. § 76.956(a).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Vista listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reviewed Cablevision's Form 1200 rate filing and confirmed that Vista calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Bell Atlantic Telephone Operating Companies — AAD 93-147

ORDER TO SHOW CAUSE

Adopted: February 24, 1995; Released: March 3, 1995

By the Commission:

1. At the direction of this Commission, the National Exchange Carriers' Association, Inc. ("NECA") hired Ernst and Young to conduct an independent audit of carrier-reported adjustments to the Common Line ("CL") revenue pool for 1988 and the first quarter of 1989.[1] Our subsequent review of that Commission-mandated audit revealed apparent violations of our accounting rules and reporting requirements by the Bell Atlantic Telephone Companies ("Bell Atlantic") during the audit period. These apparent violations may have continued beyond the period covered by the audit. This Order to Show Cause sets forth those apparent violations and directs Bell Atlantic to show cause why this Commission should not: (1) issue a Notice of Apparent Liability for Forfeiture ("NAL") for apparent violation of Section 220(d) of the Communications Act of 1934, as amended;[2] (2) require Bell Atlantic to adjust its price cap indexes; and (3) require Bell Atlantic to improve its internal processes to bring them into compliance with Commission rules and orders.

2. Enforcing our accounting rules and reporting requirements is essential for the Commission to carry out its statutory obligations to ensure that rates for telecommunications services remain just and reasonable. Our ability to carry out these obligations is impaired if we cannot rely upon the information that carriers are required to submit about the costs of their operations and their allocations of those costs, or if those allocations are made improperly. As the telecommunications marketplace continues to diversify, with carriers providing more and more nonregulated services, our enforcement of accounting safeguards will become even more important if we are to continue to protect ratepayers from being overcharged for interstate services.

I. BACKGROUND

3. Our rules require the LECs, on a monthly basis, to report to NECA their revenue, expense and investment data. NECA uses these data to compute each LEC's monthly pool shares.[3] Because LECs do not have complete data available when they first report to NECA, the LECs initially report estimated data. In the following months, the LECs are required to reconcile their estimates with actual results. To ensure the accuracy of the reconciliation process and because even the best accounting systems sometimes fail to prevent errors, NECA procedures allow the LECs twenty-four months to reconcile and correct previously submitted data. Thus, in each monthly "settlement cycle," LECs report estimated data for the current month as well as adjusted data for the preceding twenty-four months.

4. In the December 1988 settlement cycle, certain LECs reported unusually large adjustments to the CL pool. Commission staff audited the larger of these adjustments and found that they appeared to have been encouraged by NECA Board members representing the BOCs and further found them apparently inconsistent with the Commission's rules. As a result, the Commission issued *Notices of Apparent Liability for Forfeiture and Orders to Show Cause* against the BOCs that filed these adjustments.[4] The Commission

[1] NECA collects cost data, including revenue, expense and investment data, from all local exchange carriers ("LECs") on a monthly basis. These data are then used to develop LEC-specific revenue requirements which are designed to recover those LEC-incurred costs that are allocated to the interstate jurisdiction under our jurisdictional separations rules, 47 C.F.R. Part 36. The revenue requirement development process is called "pooling," because, initially, all LEC-submitted cost data are combined ("pooled") based on whether they are non-traffic sensitive (*e.g.*, CL) or traffic sensitive ("TS") in nature. Accordingly, NECA administers two revenue pools. Non-traffic sensitive, CL costs are pooled to develop CL revenue requirements, and TS costs are pooled to develop TS revenue requirements. The revenues required to recover CL costs are collected through (1) carrier common line charges billed to the interexchange carriers; (2) subscriber line charges billed to end users and other customers; and (3) surcharges assessed against special access customers. These charges are set forth in tariffs NECA prepares for pool members, primarily the smaller, independent LECs. Other LECs -- including the Bell Operating Companies ("BOCs") -- currently do not participate in the cost recovery pools and, instead, prepare their own access tariffs. As explained *infra*, however, the pools are calculated based on revenue data provided by all LECs, and revenue data reported to NECA by the large carriers will, therefore, affect the charges of pool members. Moreover, during the time period covered by the audit, our rules required all LECs to participate in the CL pool.

[2] 47 U.S.C. §220(d). At the time of the audit, the Bell Atlantic Telephone Operating Companies were known as the Bell Telephone Company of Pennsylvania (Pennsylvania Bell), the Chesapeake & Potomac Telephone Company (C&P/D.C.), the Chesapeake & Potomac Telephone Company of Maryland (C&P/Md.), the Chesapeake & Potomac Telephone Company of Virginia (C&P/Va.), the Chesapeake & Potomac Telephone Company of West Virginia (C&P/W. Va.), the Diamond State Telephone Company (Diamond State), and the New Jersey Bell Telephone Company (New Jersey Bell). Because our analysis in this Order to Show Cause is based on the independent auditor's report, we have used these names throughout. Currently the Bell Atlantic Telephone Operating Companies are: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., and Bell Atlantic-West Virginia, Inc.

[3] 47 C.F.R. §69.605.

[4] *See, e.g.*, Southwestern Bell Telephone Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7179 (1990). The Commission subsequently entered into Consent Decrees with the carriers, thus resolving these initial actions without determinations of liability. *See, e.g.*, Southwestern Bell Telephone Co., *Consent Decree Order*, 7 FCC Rcd 7692 (1992).

also issued a letter of reprimand to the NECA Board of Directors and required, *inter alia*, that NECA hire an independent auditor to perform a comprehensive audit of significant adjustments the BOCs reported to the CL pool for 1988 and 1989.[5]

5. NECA hired the public accounting firm of Ernst & Young to conduct the independent audit. Ernst & Young issued its report, which NECA submitted to the Commission on December 9, 1991.[6] That report includes numerous audit findings against the BOCs, including the Bell Atlantic carriers, concerning rule violations and conduct, some of which apparently have continued to the present. These violations could have a substantial impact on the CL pool as well as on the carriers' interstate telecommunications services customers. This is because NECA distributes access tariff revenue based on reported data. Moreover, since the reported adjustments to the CL pool involve misstatements or miscalculations of interstate costs and revenues historically used to develop the reporting carrier's access charges, and, after 1988, its price cap indexes, the reporting carrier's interstate access customers, as well as end users, are affected. Although the independent auditor's report addressed the effects of the BOCs' conduct only on the CL pool, Commission auditors are examining the effect on all interstate telecommunications services. Those of the independent auditor's findings that were directed against Bell Atlantic and that appear to warrant Commission action are the subject of this Order to Show Cause. The findings are summarized below. Attachment A provides the specific details of each finding, the Commission rules that were apparently violated, and the companies' responses to those findings. Attachment B presents, in tabular form, a summary of the apparent violations and their revenue impacts as revealed by the record to date.

II. THE FINDINGS

6. Section 220(a) of the Communications Act grants to the Commission specific authority to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject [to the Act]...."[7] In turn, Section 220(d) authorizes the Commission to impose forfeitures on carriers who do not keep such accounts, records, and memoranda in the manner prescribed by the Commission. The findings noted in Attachment A appear to reveal conduct by the Bell Atlantic carriers that violates Section 220 for the period that is the subject of the audit, namely, the period beginning January 1, 1988 and ending March 31, 1989.[8]

7. The independent auditor's findings that we address here involve the misstatement or miscalculation of $23.2 million of interstate costs and revenues from January 1988 through March 1989.[9] In the aggregate, these misstatements or miscalculations apparently benefited Bell Atlantic to the detriment of the users of Bell Atlantic's interstate telecommunications services. These misstatements or miscalculations also shifted costs between or among access elements, thus apparently distorting Bell Atlantic's interstate revenue requirements for particular services. The seriousness of the misstatements is compounded here not only because of the net impact and the extent of the overstatements, but also because of the scope of the errors or apparent violations and the fact that at least one of them apparently has continued to the date of this Order to Show Cause. The apparent violations reveal Bell Atlantic's apparent failure to maintain accounts, records, and memoranda in the manner prescribed by the Commission. To the extent that this conduct has continued, it must seriously undermine the Commission's confidence that Bell Atlantic's accounts accurately reflect Commission-mandated accounting practices or reveal the true and lawful costs of Bell Atlantic's interstate services. Moreover, and as explained more fully below, the apparent rule violations and misstatements may very well have led Bell Atlantic to compute price cap indexes that likely would require correction.

8. In the following paragraphs we describe the accounting irregularities that have led us to issue this Order to Show Cause.

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[5] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990). The letter identified "significant adjustments" as individual adjustments of $100,000 or more that the BOCs had reported to the CL pool for 1988 and 1989, other than the adjustments that had been addressed in the Commission audit. The independent audit covered the fifteen data months from January 1, 1988 through March 31, 1989, after which time participation in the CL pool became voluntary and all BOCs left that pool. The letter, however, also required that the independent audit "include adjustments reported after [the BOCs] left the pool on April 1, 1989" since carriers were allowed to submit adjustments for up to twenty-four months following a particular data month. *Id.* As a result, the independent auditor examined reported CL pool adjustments through March 1991.

[6] The Ernst & Young audit report is hereafter referred to as the "*Adjustments Report.*" On February 11, 1993, the Commission concluded that this audit had complied with Commission directives and had been performed "with a high degree of skill and care," and that the independent auditor had "exercised sound professional judgment reflecting purposes of the [audit] and the information gathered during [its] course." *See* Letter from Donna R. Searcy, Secretary, FCC, to Robert A. McArton, Chairman of the Board of Directors, NECA, 8 FCC Rcd 1315 (1993).

[7] 47 U.S.C. §220(a).

[8] The apparent violations roughly fall into two categories for purposes of potential remedies. First, certain apparent violations found to fall outside the applicable limitations period for assessing forfeitures may, nevertheless, necessitate corrective action by the Commission. For example, the Commission may require adjustments to carrier price cap indexes to eliminate distortions caused by unlawful conduct. Second, other apparent violations, if found to be continuing or to have continued into the period covered by the limitations period, could support Notices of Apparent Liability for Forfeiture under Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, as well as support other remedies, such as price cap adjustments.

[9] These figures are based on estimates provided by Bell Atlantic to the independent auditor. *See* Letter from Bruce Baldwin, President, National Exchange Carrier Association, Inc., to Mr. Gerald P. Vaughan, Deputy Chief, Operations, Common Carrier Bureau, at Bell Atlantic Attachment (Oct. 12, 1992). Although those estimates encompass most of the independent auditor's findings, Bell Atlantic did not provide estimates of the impact of certain findings on interstate rates and revenue requirements.

A. Apparent Cash Working Capital Violations

9. The independent auditor found that during the audit period Bell Atlantic calculated cash working capital allowances improperly.[10] These allowances are supposed to reflect the average amount of investor-supplied capital needed to fund carriers' day-to-day operations.[11] The cash working capital allowance is added to the carrier's rate base, thereby increasing the earnings the carrier is allowed. In computing cash working capital, carriers are allowed to add minimum bank balances to the results obtained from their lead-lag studies if this practice is required by local banks.[12] Bell Atlantic apparently included minimum bank balances in five study areas (New Jersey, West Virginia, Maryland, Virginia and the District of Columbia) where bank practices do not require minimum bank balances.[13]

B. Apparent Jurisdictional Separations Violations

10. Responsibility for regulating telephone services is shared between this Commission, which regulates interstate service, and state commissions, which regulate intrastate service. Carriers must use a process called jurisdictional separations to apportion their costs and revenues between the state and interstate jurisdictions. The separations procedures are set forth in Part 36 of our rules.[14] As correctly noted by the independent auditor, Section 36.353(b) of the Commission's rules[15] requires carriers to apportion their network operations expenses between state and federal operations by applying specified use factors to designated accounts. Bell Atlantic, instead, has used an apportionment methodology that it incorrectly and misleadingly calls "direct assignment." According to the independent auditor, this methodology apparently resulted in an overstatement of Bell Atlantic's revenue requirements of $21.6 million for January 1988 through March 1989.[16] Moreover, according to the record, Bell Atlantic apparently continued to use this allocation method for at least some time after March 1989, raising the likelihood of further revenue requirement overstatements and, consequently, potential distortions to the carrier's price cap indexes.[17] The independent auditor also found that Bell Atlantic carriers apparently failed to correctly apportion certain information origination/termination ("IOT") equipment costs in violation of Section 36.142(a) of the Commission's rules.[18]

C. Apparent Depreciation Calculation Violations

11. In 1990, in the exercise of its Section 220(b)[19] depreciation prescription authority, the Commission prescribed revised depreciation rates and amortizations for certain carriers including Bell Atlantic.[20] The independent auditor found that C&P/D.C. failed to properly follow the requirements imposed by the Commission in its prescription order by improperly implementing necessary retroactive adjustments for January and February 1989.[21] Moreover, the independent auditor concluded that this error caused C&P/D.C. to record depreciation and amortization expenses improperly.[22]

D. Lack of Documentation and Other Apparent Errors

12. The independent auditor also found apparent rule violations that could be characterized as documentation or clerical errors. For example, the independent auditor found that certain Bell Atlantic operating companies could not provide documentation to support revenue and cost adjustments.[23] In other cases, the independent auditor concluded that some of these operating companies incorrectly processed revenue reconciliations or otherwise reported incorrect revenues to NECA for various transactions.[24] In still other cases, the independent auditor concluded that Bell Atlantic improperly adjusted its cost allocation manuals and, as a result, submitted incorrect data to the CL pool.[25] As such errors and other violations accumulate, the data carriers report to NECA under Section 69.605 of our rules[26] and to us under Parts 43 and 65 of our rules,[27] become increasingly unreliable. Although these errors may have no current impact on Bell Atlantic's interstate rates, their number and scope persuade us to order Bell Atlantic to show cause why its internal accounting and accounting-related processes should not generally be brought into compliance with Commission rules and orders.

III. DISCUSSION AND CONCLUSION

A. NALs

13. We find that the Bell Atlantic carriers' conduct appears to be inconsistent with their statutory obligation to maintain their accounts, records, and memoranda as prescribed by the Commission. Carriers must accumulate, process, and report their financial and operating data in accordance with very specific Commission requirements because we rely on those data to help us ensure that

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10 *Attachment A*, at 1-3.

11 *See, e.g.*, American Telephone and Telegraph Company, Docket No. 19129, *Phase II Initial Decision*, 64 FCC 2d 131, 389-390, paras. 880-87 (1976); *Phase II Final Decision*, 64 FCC 2d 1, 76, para. 194 (1977) (*19129 Phase II Final Decision*).

12 *See Attachment A*, at 1-2. Lead-lag studies measure cash inflows and outflows in relation to the time service is rendered. Revenue and expense items that are received or paid before a service is rendered are considered "lead" items, and revenue and expense items that are received or paid after service is rendered are considered "lag" items. Lead-lag studies determine the number of days between receipt of revenues and payment of expenses.

13 *Id.*

14 47 C.F.R. Part 36.

15 47 C.F.R. §36.353(b).

16 *Attachment A*, at 3.

17 In paragraph 15, *infra*, we discuss how such overstatements could lead to distortions to Bell Atlantic's price cap indexes.

18 *Id.* at 4-5.

19 47 U.S.C. §220(b).

20 *Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended, for: GTE Florida Inc. et. al.*, 5 FCC Rcd 766 (1990) (*1990 Prescription Order*).

21 *Attachment A*, at 6.

22 *Id.*

23 *Id.* at 7.

24 *Id.* at 8.

25 *Id.* at 9.

26 47 C.F.R. §69.605.

27 47 C.F.R. Parts 43, 65.

interstate telephone rates are just and reasonable. Moreover, we cannot evaluate how well our accounting rules work if carriers disregard or misinterpret these rules. Therefore, where, as appears to be the case with regard to Bell Atlantic, carriers either violate our rules or fail to maintain the internal systems necessary to ensure compliance, we believe forfeitures may be appropriate under Section 220(d) of the Act.[28]

14. Section 220(d) of the Act authorizes us to impose forfeitures of up to $6000 per carrier per day for accounting-related violations.[29] Obviously, any violations that continued beyond the audit period and to the present could trigger substantial forfeiture amounts for the seven Bell Atlantic companies based on appropriate application of the statute of limitations. In order to make a determination about the scope of any forfeitures that may lie, we direct Bell Atlantic to identify with specificity the date on which the conduct cited herein and detailed in Attachment A ceased, if ever, and otherwise show why notices of apparent liability pursuant to Section 1.80 of the Commission's rules should not issue.[30] Bell Atlantic's response should include a discussion of the appropriate application of the prescribed limitations period.[31] Bell Atlantic's response should also identify any mitigating circumstances we should consider in determining forfeiture amounts.[32]

B. Adjustments to Price Cap Indexes

15. As indicated above, Bell Atlantic did not provide estimates of the impact on interstate service rates and revenue requirements of the conduct described in one of the independent auditor's findings.[33] So that we may assess the full impact of Bell Atlantic's conduct, we order the Bell Atlantic carriers to estimate the interstate impact of this finding, and to file their estimates with the Commission. This filing shall include estimates of the annual effect of the finding on Bell Atlantic's CL, TS, special access, billing and collection, and interexchange costs and revenues for the period from January 1, 1988 to the public release date of this Order to Show Cause. We also direct Bell Atlantic to provide estimates of the impact on the operating companies' interstate revenue requirements attributable to all conduct discussed in this Order and in Attachment A that continued beyond the period of the audit, and to file these estimates with its response.

16. Since January 1, 1991, the Commission has regulated Bell Atlantic's interstate access charges using the LEC price cap rules.[34] Under these rules, Bell Atlantic's initial price cap indexes were established based upon its projected interstate access revenue requirements for July 1, 1990 to June 30, 1991. Bell Atlantic's calculation of those revenue requirements may have reflected the practices detailed in Attachment A. Because, under price cap regulation, each succeeding price cap index for a basket of services is a function of the initial price cap index for that basket, Bell Atlantic's price cap indexes for its interstate services (and, by definition, its interstate rates) would have continued to reflect the impact of any improper practices.[35] Absent Commission action, Bell Atlantic's future indexes would reflect any overstatement as well. Therefore, we order Bell Atlantic specifically to show cause why we should not require Bell Atlantic to reduce its current price cap indexes to remove any overstatement.[36]

C. Corrective Action

17. Finally, we tentatively conclude that we should direct the Bell Atlantic carriers to improve their internal processes to bring them into compliance with Commission rules and orders, and we order those carriers to show cause why such action should not be required. We will take any additional actions we believe appropriate, including issuing a further Order to Show Cause, based on Bell Atlantic's response.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 220(d), and 504(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), & 504(b), and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that the Bell Atlantic Telephone Operating Companies SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why this Commission should not issue Notices of Apparent Liability for Forfeiture against these companies for failure to keep their accounts, records, and memoranda on the books and in the manner prescribed by the Commission as set out in this Order to Show Cause, including Attachments A and B which are hereby incorporated by reference, and SHALL FILE all data and other information required by this Order to Show Cause, including information requested in Attachment A.

19. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, & 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that the Bell Atlantic Companies SHALL FILE within sixty (60) days of the release date of this Order to Show Cause interstate cost and revenue impact estimates as specified in paragraph 14, *supra*.

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[28] 47 U.S.C. §220(d). Section 220(d) provides for forfeitures if a carrier fails to keep its accounts, records and memoranda in the manner prescribed by the Commission.

[29] 47 U.S.C. §220(d). Prior to December 19, 1989, the forfeiture amount was fixed at $500 per violation per day.

[30] 47 C.F.R. §1.80.

[31] *See* 47 C.F.R. §1.80(c)(2). Although Bell Atlantic's violations began January 1, 1988, we would assess forfeitures only for violations occurring within the limitations period.

[32] *See* 47 U.S.C. §504(b).

[33] *See supra* note 9. As discussed in paragraph 20 of Attachment A, the independent auditor found 14 unsupported retroactive adjustments made by Bell Atlantic during the audit period.

[34] *See Policies and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), *Erratum*, 5 FCC Rcd 7664 (Com. Car. Bur.1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Reconsideration Order*), *aff'd, National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[35] *See* 47 C.F.R. §§61.44(b), 61.45(b)-(c).

[36] To achieve this, Bell Atlantic would need to reduce its price cap indexes by the percentage change in its July 1, 1990 to June 30, 1991 projected interstate access revenue requirement that results from the removal of any overstatement. These reductions to the price cap indexes would need to be apportioned among the baskets based on the relative July 1, 1990 to June 30, 1991 projected interstate access revenue requirements in each basket.

20. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, & 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that the Bell Atlantic Companies SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why they should not be required to adjust their price cap indexes as specified in paragraph 15, *supra*.

21. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that the Bell Atlantic Companies SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why they should not be required to improve their internal processes to bring them into compliance with Commission rules and orders.

22. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of this Order to Show Cause to the Bell Telephone Company of Pennsylvania, One Parkway, Philadelphia, Pennsylvania 19102; the Chesapeake and Potomac Telephone Company, 1710 H Street, N.W., Washington, D.C. 20006; the Chesapeake and Potomac Telephone Company of Maryland, One East Pratt Street, Baltimore, Maryland 21202; the Chesapeake and Potomac Telephone Company of Virginia, 600 East Main Street, Richmond, Virginia 23219; the Chesapeake and Potomac Telephone Company of West Virginia, 1500 MacCorkle Avenue, S.E., Charleston, West Virginia 25314; the Diamond State Telephone Company, 911 Tatnall Street, Wilmington, Delaware 19801; and the New Jersey Bell Telephone Company, 540 Broad Street, Newark, New Jersey 07101.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ATTACHMENT A

1. We present below the apparent violations of the Bell Atlantic carriers based on the findings in the Ernst & Young report that prompt us to issue the accompanying *Order to Show Cause*. For each apparent violation, we summarize the independent auditor's finding and any Bell Atlantic reply. We also present our preliminary evaluation of the record. In general, the violations are categorized according to the ratemaking component affected. This attachment separates the apparent violations into the following categories: cash working capital, jurisdictional separations, depreciation, lack of documentation, and other apparent errors. In attachment B, we present the information in the record that describes the impact of these apparent violations on the Bell Atlantic carriers' interstate revenue requirements for the fifteen-month audit period.

A. Cash Working Capital

2. We find that Bell Atlantic's calculation of cash working capital allowances may have violated Commission requirements. Specifically, Bell Atlantic's development of those allowances apparently violated Sections 65.800 and 65.820(d) and (e) of the Commission's rules, which instruct carriers on how to calculate the interstate rate base.[1] As a result of its cash working capital calculations, Bell Atlantic reported incorrect information to NECA in apparent violation of Section 69.605 of the rules,[2] and to the Commission in apparent violation of Section 65.600 of the rules.[3] Finally, to the extent this information has been reported in the Commission's automated database, Automated Reporting Management Information System (ARMIS), Bell Atlantic also appears to have violated Section 43.21 of the rules, which requires that data filed in ARMIS be accurate, complete, and responsive, and certified as such by a senior carrier officer.[4]

3. The elements of lead-lag studies to calculate cash working capital were set forth in Docket No. 191293[5] and reaffirmed in Docket No. 86-497.[6] Lead-lag studies measure cash inflows and outflows in relation to the time service is rendered. Revenue and expense items that are received or paid before a service is rendered are considered "lead" items, and revenue and expense items that are received or paid after service is rendered are considered "lag" items.[7] Lead-lag studies determine the number of days between receipt of revenues and payment of expenses. The net number of revenue lag days is then multiplied by the average daily cash expenses to determine cash working

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[1] 47 C.F.R. §§65.800, 65.820(d)-(e). These rules require carriers, like the Bell Atlantic carriers, to calculate the cash working capital component of their interstate rate base either by performing a lead-lag study of interstate revenue and expense items or by applying a specified formula. Bell Atlantic elected to perform lead-lag studies.

[2] 47 C.F.R. §69.605.

[3] 47 C.F.R. §65.600. In these rate of return reports to the Commission, Bell Atlantic is required to "provide full and specific answers to all questions propounded and information requested...." 47 C.F.R. §65.600(b), (d)(1).

[4] 47 C.F.R. §43.21(a).

[5] American Telephone & Telegraph Co., Docket No. 19129, *Phase II Final Decision*, 64 FCC 2d 1, 72-73, para. 187 (1977) (*19129 Phase II Final Decision*), *aff'g Phase II Initial Decision*, 64 FCC 2d 131 (1976) (*19129 Phase II Initial Decision*). 3

[6] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, *Report and Order*, 3 FCC Rcd 269 (1987) (*86-497 Order*), *recon.*, 4 FCC Rcd 1697 (1989) (*86-497 Reconsideration Order*), *remanded sub nom.* Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (*Illinois Bell I*), *on remand*, 7 FCC Rcd 296 (1991) (*84-497 Decision on Remand*), *affirmed sub nom.* Illinois Bell Telephone Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993) (*Illinois Bell II*).

[7] Related terms include "expense lag" (the average net lag of all of a carrier's cash expenses); "revenue lag" (the average net lag of a carrier's revenues); and "net lag" (the net of a carrier's expense lag and revenue lag).

capital.[8] A positive net lag results in a positive cash working capital allowance, which increases the rate base; a negative one results in a negative allowance, which reduces the rate base.[9] In previous orders and proceedings, we have set forth the specific criteria for the inclusion and exclusion of various items in cash working capital calculations, but the general rule is that the net lead or lag is applied to the average daily *cash* expenses. The specifics of Bell Atlantic's apparent violation is discussed below.

4. *Apparent Violation No. 1:* Minimum bank balance are balances "maintained in an account to compensate banks, in lieu of fees, for services provided to that account."[10] In Docket 19129, the Commission determined that minimum bank balances and working cash advances were to be included in the cash working capital allowance.[11] The purpose behind including minimum bank balances is to protect carriers from loss of a return if their money is encumbered because of a bank requirement. The purpose is not to allow carriers to earn a return on whatever money they may have in the bank based on cash management techniques.[12]

5. The independent auditor found that Bell Atlantic included minimum bank balances in cash working capital for five study areas, even though, according to Bell Atlantic, the banks in these study areas did not have minimum bank balance requirements. The minimum bank balances were included in cash working capital during the early months of 1988 for Maryland, Virginia, West Virginia, and the District of Columbia, and during all data months for New Jersey. In total, Bell Atlantic's treatment of minimum bank balances overstated the total interstate revenue requirement by $211,000, the common line revenue requirement by $99,000, the traffic sensitive revenue requirement by $72,000 and the special access revenue requirement by $39,000.

6. Bell Atlantic has not refuted or responded to the finding, but has admitted that the banks in these study areas do not require minimum bank balances. We find that Bell Atlantic's cash working capital computations apparently violated Commission requirements.

B. Jurisdictional Separations

7. *Apparent Violation No. 2:* Part 32 of the Commission's rules defines the accounts that Bell Atlantic must use for recording its investments, expenses, and revenues. Part 36, which contains the rules for allocating telephone company investment, expenses, and revenues between the federal and state jurisdictions, defines many of the allocation rules in terms of the Part 32 accounts. Section 36.353(b) of the Commission's rules requires carriers to apportion their network operations expenses between the federal and state jurisdictions "based on the separations of Account 2210, Central Office Switching, Account 2220, Operator Systems, Account 2230, Central Office Transmission, Account 2310, Information Origination/Termination and Account 2410, Cable and Wire Facilities, combined."[13] The independent auditor found that instead of using this methodology, Bell Atlantic apportioned the trunk testing expenses portion of its network operations expenses between the jurisdictions based on the allocation of the associated trunk investment.[14] The independent auditor stated that this procedure overstated Bell Atlantic's interstate revenue requirements for January 1988 through March 1989 by $21,619,000.[15]

8. In its response to the independent auditor's findings, Bell Atlantic provides three reasons why it believes its method of separating trunk testing expenses complies with the Commission's rules. First, Bell Atlantic contends that its method is a "direct assignment" permitted under Section 36.1(c) and 36.2(a)(1) of the Commission's rules,[16] as interpreted in the *Tariff Waiver Order*.[17]

9. Bell Atlantic's reliance upon the *Tariff Waiver Order* is misplaced, because its method was not direct assignment, but another method of allocation not prescribed by our rules. To apply its method, Bell Atlantic used technician time reports to isolate total trunk testing hours and to break them down among time spent testing switched access trunks, special access trunks, and other trunks. Bell Atlantic recorded the costs for these three categories separately in the company ledgers, using appropriate hourly rates that include benefit expenses. Bell Atlantic then jurisdictionally separated the costs in each of these categories based on the jurisdictional apportionment of the related trunk investment for central office transmission equipment and cable and wire facilities. All remaining network operations expenses, including subscriber loop testing expenses, became the fourth category and were jurisdictionally separated by Bell Atlantic using the apportionment factor specified in Section 36.353.[18]

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[8] *86-497 Decision on Remand*, 7 FCC Rcd at 297, para. 9.

[9] Annual 1990 Access Tariff Filings, *Memorandum Opinion and Order*, 5 FCC Rcd 4177, 4219 (1990).

[10] *Docket 19129 Phase II Final Decision*, 64 FCC 2d at 76, para. 195 n.102.

[11] *Docket 19129 Final Decision*, 64 FCC 2d at 76, para. 195; *Docket 19129 Initial Decision*, 64 FCC 2d at 409-10, paras. 905-08; *accord 86-497 Reconsideration Order*, 4 FCC Rcd at 1698-99, paras. 17, 22.

[12] The ALJ emphasized that:

> working capital is intended to provide only for the current day-to-day needs of the business and not for any of the capital requirement. Second, working capital is the amount of dollars that are necessary to meet current needs, not the amount of dollars that a public utility would like to have on hand or might actually have on hand.

Docket 19129 Initial Decision, 64 FCC 2d at 403, para. 881.

[13] 47 C.F.R. §36.353(b).

[14] *Adjustments Report* at 30.

[15] Letter from Bruce Baldwin, President, National Exchange Carrier Association, Inc., to Mr. Gerald P. Vaughan, Deputy Chief, Operations, Common Carrier Bureau, at Bell Atlantic Attachment (October 12, 1992)(*October 12 Letter*).

[16] 47 C.F.R. §§36.1(c), 36.2(a)(1).

[17] *Adjustments Report* at 31, *citing* Annual 1988 Access Tariff Filing Petitions for Waiver, 2 FCC Rcd 5659 (Com. Car. Bur. 1987) (*Tariff Waiver Order*). This order held that under Section 36.1(c) of the rules, 47 C.F.R. §36.1(c), any costs that can be directly assigned to a jurisdiction should be. That holding has been overruled. Applications for Review of the Common Carrier Bureau's Letter of Interpretation Regarding the Clarification of the Role of Direct Assignment in the Jurisdictional Separations Process, 8 FCC Rcd 1558 (1993), *aff'g Letter of Interpretation*, 6 FCC Rcd 5068 (Com. Car. Bur. 1991).

[18] *See* Chesapeake & Potomac Telephone Co., 7 FCC Rcd 3622, 3622, para. 5 (1992) (*C&P Waiver Order*). Bell Atlantic states

10. The procedure used by Bell Atlantic is not direct assignment. Direct assignment categorizes costs as wholly interstate or wholly intrastate with no need for further allocation. Bell Atlantic's procedure assigned costs to categories based on technician time reports and then allocated these categories between the interstate and intrastate jurisdictions based on a relative use factor (*i.e.*, the jurisdictional apportionment of related trunk investment).[19]

11. Second, Bell Atlantic states that during 1988, its "direct assignment" practices were endorsed by the Commission staff and the District of Columbia Public Service Commission.[20] Bell Atlantic provides no official communication to substantiate these alleged endorsements. It is well established that the informal advice of Commission staff does not excuse rule violations.[21]

12. Third, Bell Atlantic argues that it reasonably relied on the *Tariff Waiver Order* since it was not overruled until after the time frame of the audit.[22] Bell Atlantic's reliance on the *Tariff Waiver Order*, however, is irrelevant. Bell Atlantic's procedure for assigning trunk testing expenses cannot be thought of as a direct assignment. The only acceptable method for apportioning trunk testing expenses is the one prescribed in Section 36.353, and Bell Atlantic's method of assigning trunk testing expenses does not comply with this rule. Therefore, we find that Bell Atlantic apparently violated Section 36.353.

13. *Apparent Violation No. 3 :* Effective January 1, 1988, the Commission adopted Section 36.142(a) of the rules,[23] which requires certain carriers, including the Bell Atlantic carriers, to apportion all their information origination/termination (IOT) equipment costs,[24] other than those for coinless pay telephone equipment and detariffed customer premises equipment, between the federal and state jurisdictions. Bell Atlantic initially did not comply with this rule and directly assigned portions of IOT costs to special access. Bell Atlantic, however, later made adjustments to reverse the direct assignment and bring its carriers into compliance with Section 36.142(a).[25]

14. Even with Bell Atlantic's attempt to bring carriers into compliance the independent auditor found that two of the Bell Atlantic carriers failed to comply fully with Section 36.142(a). The first of these carriers, C&P of West Virginia, failed to make retroactive adjustments for January 1988 through March 1988. The second carrier, C&P of Virginia, continued to assign digital data system costs directly to special access through December 1988.[26] These direct assignments shifted $24,000 of C&P of West Virginia's and $73,000 of C&P of Virginia's costs from CL to special access.[27] Bell Atlantic states that since 1988, it has implemented procedures to improve its internal controls.[28]

15. While the Bell Atlantic carriers did not initially comply with that rule, they appear to have moved expeditiously to correct the improper direct assignment of IOT costs to special access. Nonetheless, C&P of West Virginia and C&P of Virginia, apparently failed to achieve full compliance. These apparent failures cast doubt on the adequacy of C&P of West Virginia's and C&P of Virginia's internal controls. Bell Atlantic, however, has stopped assigning IOT investment directly to special access by the end of 1988, and, thus, we propose no further action on this matter at this time.

C. Depreciation

16. *Apparent Violation No. 4:* Section 220(b) of the Communications Act of 1934, as amended,[29] authorizes this Commission to prescribe depreciation rates to compute the allowable depreciation expense for telephone common carriers, such as the Bell Atlantic carriers. We prescribed revised depreciation rates and amortizations for eleven domestic carriers, including C&P-D.C. (District of Columbia), that filed requests in 1989 for changes in their annual depreciation rates.[30] The revised rates were to take effect retroactive to January 1, 1989.[31]

17. The independent auditor found that C&P-D.C. failed to follow the *1989 Prescription Order*. The auditor explained that C&P-D.C. initially made an interim adjustment in March, 1989 necessary to implement the 1989 rates retroactive to January 1, 1989.[32] The independent auditor stated that C&P-D.C. made a second adjustment in August 1989, partially reversing the initial adjustment for January and February 1989.[33] According to the independent auditor, this improper adjustment caused a $562,000 overstatement in C&P-D.C.'s interstate revenue requirement for March 1989.[34] Bell Atlantic argues that it made

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that it used an allocation procedure for trunk testing expenses similar to that described in the *C&P Waiver Order*. *Adjustments Report* at 31.

19 47 C.F.R. §36.2(c).

20 *Adjustments Report* at 31.

21 *Malkan FM Assoc. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991).

22 *Adjustments Report* at 31.

23 47 C.F.R. §36.142(a).

24 IOT equipment consists of electronic devices and supporting equipment used to originate and terminate telecommunication messages at the end users' premises. *See* 47 C.F.R. Part 36, Appendix. It includes station apparatus such as telephone and miscellaneous equipment, teletypewriter equipment, small private branch exchanges, and radio equipment (excluding mobile) installed for the end users' use. It also includes embedded customer premise wiring, large private branch exchanges, public telephone terminal equipment, and other terminal equipment. *See* 47 C.F.R. §36.141(a).

25 *Adjustments Report* at 33.

26 *Id.*

27 *October 12 Letter*, at Bell Atlantic Attachment.

28 *Adjustments Report* at 33.

29 47 U.S.C. §220(b).

30 *Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: GTE Florida Inc. et. al.*, 5 FCC Rcd 766 (1990) (*1989 Prescription Order*).

31 *Id.* at 769, para. 26, 772.

32 Although orders prescribing depreciation rates generally are adopted toward the end of the calendar year, the Common Carrier Bureau has authority to allow carriers to book the depreciation rates on a interim basis during the depreciation rate prescription process. The Common Carrier Bureau granted permission to C&P-D.C. to book depreciation expense using the 1989 rates beginning March 1, 1989. Since the rates are effective as of January 1, 1989, C&P-D.C. was require to make a retroactive adjustment implementing the 1989 rates for January and February, 1989. See Letter to John F. Gamba, Vice President, the Chesapeake and Potomac Telephone Company of D.C., from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, FCC (March 21, 1989).

33 *Adjustments Report* at 33-34.

34 *October 12 Letter* at Bell Atlantic Attachment.

very few errors in relation to the 5.000 input items it has each data month. Bell Atlantic states that it constantly reviews procedures and systems to improve controls and that it has improved its input controls since 1988.[35]

18. We find that C&P-D.C. apparently violated the *1989 Prescription Order* when it partially reversed its initial depreciation adjustment for January and February 1989. Moreover, we believe that reversal of the adjustment goes beyond a routine data input item and cannot be treated as inadvertent error. In our view, a properly functioning internal control would have discovered this error and corrected it. Since depreciation and amortization expenses are recorded in Accounts 32.6560 through 32.6565, we also find that this partial reversal resulted in apparent violations of Sections 32.6560 through 32.6565 of the Commission's rules.[36]

D. Lack of Documentation

19. *Apparent Violation No. 5:* One element of a reliable accounting system is records that support accounting entries. Section 220(c) of the Communications Act recognizes this by authorizing the Commission to have access to and the right of inspection and examination of "all accounts, records, and memoranda, including all documents, papers, and correspondence. . . kept or required to be kept" by the Bell Atlantic carriers.[37] Section 220(c) also places "[t]he burden of proof to justify every accounting entry questioned by the Commission . . . on the person making, authorizing, or requiring such entry . . ."[38] In addition, Section 32.12(b) of our rules requires the Bell Atlantic carriers to keep their accounting records "with sufficient particularity to show fully the facts pertaining to all accounting entries" and to file "[t]he detail records in such manner as to be readily accessible for examination" by Commission representatives.[39]

20. The independent auditor found that Bell Atlantic could not provide adequate documentation supporting the following retroactive adjustments: (1) Bell of Pennsylvania could not provide support documentation for two revenue adjustments for various months and one cost adjustment; (2) C&P of Virginia could not provide support documentation for three cost adjustments; (3) Diamond State could not provide support documentation for two cost adjustments; and (4) New Jersey Bell could not provide support documentation for six cost adjustments. In total, the auditor found fourteen unsupported retroactive adjustments for January 1988 through March 1989.[40] Bell Atlantic did not quantify the effect of these adjustments on interstate revenue requirements.

21. Bell Atlantic states that it provided "substantially all" of the documentation requested by the independent auditor but some documentation had been misplaced when Bell Atlantic centralized the separations staffs for the C&P companies and for Bell of Pennsylvania, Diamond State, and New Jersey Bell. Bell Atlantic contends that the misplaced documentation related to routine items and that the adjustments for those items were consistent with adjustments for which support documentation was provided.[41]

22. Neither Section 220 nor Section 32.12(b) states that retaining "substantially all" of the support documentation for adjustments constitutes compliance with these sections. Similarly, neither the Act nor our rules exempt carriers from retaining support documentation for adjustments, even if these adjustments are routine or consistent with other adjustments. Because Bell Atlantic failed to provide support documentation under Section 220 of the Act and Section 32.12(b), we find that Bell Atlantic's apparent documentation failures would support a conclusion that Bell Atlantic fails to keep its accounts, records, and memoranda as prescribed by the Commission.

E. Other Apparent Errors

23. Section 69.605 of the Commission's rules pertains specifically to reporting and distribution of NECA pool access revenues. It requires LECs to report accurate access revenues and cost data to NECA for computation of monthly pool revenues distributions. This information must be accurate and maintained in accordance with Commission rules. The following findings identify discrepancies between data reported to NECA and data in Bell Atlantic's accounts, records, and memoranda.

24. *Apparent Violation No. 6 :* The 800 Readyline service was an AT&T 800 service offering that terminated over the customer's local exchange service line rather than over a dedicated WATS-type line. The independent auditor found that New Jersey Bell for several months incorrectly processed the 800 Readyline revenue adjustments that updated previous revenue estimates. Because of these errors, New Jersey Bell overstated its revenues for the common line (CL) pool by $281.000.[42]

25. *Apparent Violation No. 7:* The independent auditor also found that New Jersey Bell and C&P of West Virginia reported incorrect revenues to NECA for various transactions that resulted in a $160.000 understatement of revenue reported to the CL pool.[43] Bell Atlantic admits these errors, but explains that "[r]elative to the 5.000 input items it processes, very few errors were made."[44] Additionally, it states that it has improved its input controls since 1988.[45] Having a heavy case load or providing accurate information most of the time, however, does not excuse a carrier from reporting accurate revenue amounts, and we find that Bell Atlantic's input controls apparently failed in these instances.

26. *Apparent Violation No. 8:* The independent auditor found errors by Bell Atlantic regarding adjustments to reflect changes to its cost allocation manual. The *Joint Cost Order*[46] requires carriers with annual operating revenues of $100 million or more to file manuals that allocate their

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35 *Adjustments Report* at 34.
36 47 C.F.R. §§32.6560 - 32.6565.
37 47 U.S.C. §220(c).
38 *Id.*
39 47 C.F.R. §32.12(b).
40 *Adjustments Report* at 36.
41 *Id.* at 37.
42 *Adjustments Report* at 34; *October 12 Letter* at Bell Atlantic Attachment.
43 *Adjustments Report* at 35; *October 12 Letter* at Bell Atlantic Attachment.
44 *Adjustments Report* at 34-35.
45 *Id.*
46 Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298,1300 (1987) (*Joint Cost Order*).

costs between regulated and nonregulated activities.[47] In the *Bell Atlantic Compliance Order*,[48] the Common Carrier Bureau approved Bell Atlantic's revised cost allocation manual subject to certain revisions. Bell Atlantic revised its manual accordingly and specified that certain of the revisions would be made retroactive to January 1, 1989.[49]

27. The independent auditor found errors in C&P of Virginia's adjustments for the first quarter of 1989 made to reflect its cost manual revisions . The auditor found that Bell Atlantic made input errors to its separations process for revenue, depreciation expense, and customer operations expense for January through March 1989 that resulted in incorrect separations allocations to interstate that were not consistent with Part 36 of the Commission's rules.[50] Acording to the independent auditor, these separations amounts were incorrect, and therefore, subsequent adjustments based on them were also incorrect.[51] As result, Bell Atlantic's interstate revenue requirements were understated by $402,000 for January 1988 through March 1989.[52] Bell Atlantic has not responded to these findings.

28. On the basis of the record, we find that Bell Atlantic apparently recorded incorrect cost manual data and apparently submitted such data to NECA. We find apparent violations of our joint cost requirements and Section 69.605(a), which requires accurate data be reported to NECA for the computation of monthly pool distributions.[53]

29. The errors detailed above suggest that Bell Atlantic's internal controls apparently failed to function properly in multiple instances. As a result of these errors, it may be necessary to require adjustments to Bell Atlantic's price cap indexes and take other remedial action depending upon our review of the additional information we have directed Bell Atlantic to submit.

Modified on recon., 2 FCC Rcd 6383 (1987), *modified on further recon.* 3 FCC Rcd 6701 (1988) *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[47] This policy is now codified at Section 64.903 of the Commission's rules, 47 C.F.R. §64.603.

[48] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496 (Com. Car. Bur. 1989) (*Bell Atlantic Compliance Order*).

[49] Letter from James J. Farrell, Executive Director - FCC Contact, Bell Atlantic to Donna R. Searcy, Secretary, FCC, at Attachment A (Feb. 28, 1989).

[50] 47 C.F.R. Part 36.

[51] *Adjustments Report* at 32.

[52] *October 12 Letter*, at Bell Atlantic Attachment.

[53] 47 C.F.R. §69.605(a).

Attachment B

BELL ATLANTIC - Summary of Apparent Violations

INTERSTATE REVENUE REQUIREMENT OVERSTATEMENT FOR THE AUDIT PERIOD (See Note) ($000)

COMMISSION FINDING	CARRIER	TOTAL	COMMON LINE	OTHER INTERSTATE ACCESS ELEMENTS
1. Reported minimum bank balances for CWC. These study areas have no minimum bank balance requirement.	D.C. Maryland New Jersey Virginia W. Virginia	211	99	112
2. Used allocation procedure inconsistent with 36.353 of the rules.	All	21,619	9,299	12,320
3. Incorrect direct assignment of IO/T.	W. Virginia	0	(24)	24
3. Incorrect direct assignment of IO/T.	Virginia	0	(73)	73
4. Erroneous depreciation expenses.	D.C.	562	174	388
5. Numerous unsupported retroactive adjustments.	All		Unknown	
6. Incorrectly processed 800 readyline services true-ups.	New Jersey	(281)	(281)	0
7. Input errors for revenue reported to NECA.	All	160	160	0
8. Numerous errors in Part 64 retroactive adjustments due to SIS input errors.	Virginia	(402)	(204)	(198)

Note: Overstated expenses are indicated by positive amounts.
Understated expenses are indicated by negative (parentheses) amounts.
Overstated revenues are indicated by negative (parentheses) amounts.
Understated revenues are indicated by positive amounts.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE
TELEVISION OF ORANGE
COUNTY, INC. d/b/a
DIMENSION CABLE SERVICES

Appeal of Local Rate
Order of the City of San
Clemente, California

ORDER

Adopted: March 8, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 7, 1994, Time Mirror Cable Television of Orange County, Inc. d/b/a Dimension Cable Services ("Dimension"), filed with the Commission an appeal of the local rate order adopted on September 7, 1994 by the City of San Clemente, California (the "City").[1] In its order, the City established Dimension's rates for basic cable service, equipment, installations and hourly service charges. As part of this decision, the City found Dimension's collective or package offering ("Preferred Dimension" package) of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of its order. The City ordered Dimension to make refunds to subscribers for all payments made in excess of the rates set forth in the City's order for the period September 1, 1993 through July 14, 1994.[2]

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[7]

3. Dimension objects to the City's decision to calculate maximum initial permitted rates for basic services by treating Dimension's a la carte package, consisting of American MovieClassics, Turner Network Television, The Discovery Channel and The Nashville Network, as a rate regulated offering. Dimension argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[8] Dimension also objects to the City's decision to prevent Dimension from assessing an additional outlet charge to cable programming service subscribers and the City's decision to disallow Dimension's allocation of a portion of its franchise fees to equipment revenues on Form 393. We address each issue in turn.

II. DISCUSSION

A. A La Carte Offerings

4. Dimension objects to the City's finding that the channels comprising its Preferred Dimension a la carte package must be included as regulated channels. Dimension argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[9] Dimension further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Dimension's a la carte channels constituted "retroactive rulemaking."[10] The City responds that it properly applied

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[1] The City filed its opposition on October 20, 1994 to which Dimension filed a reply on November 3, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) (1992) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[3] 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[5] *Id.*

[6] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[7] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[8] *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[9] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[10] In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a

the Commission's guidelines on a la carte packages and concluded that the channels in Dimension's package should be treated as regulated channels.

5. The Dimension a la carte package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its system which serves the City. Dimension states that its September 1, 1993 restructuring involved offering four channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services, Oceanside, California*, 10 FCC Rcd 7311 (Cab. Serv. Bur. 1994). In *Dimension Cable Services*, we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 93-286, Fifth Report and Order*, 10 FCC 1226 (1995) (*"Going Forward Order"*) .[11]

7. We find that the City's determination in its local rate order that the channels comprising Dimension's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Dimension's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.[12]

B. Additional Outlet Charges

8. Dimension next contends that the City improperly disallowed its additional outlet charge. Dimension claims that the charge is assessed to recover additional program supplier costs for the cable programming service (CPS) tier and therefore only subscribers receiving the CPS tier are assessed the additional charge. The City does not dispute Dimension's assertion that only CPS subscribers are assessed the charge. Characterizing the charge as related exclusively to programming costs for its CPS tier, Dimension further contends that the City lacked jurisdiction to rule on the matter. The City counters that Dimension did not adequately justify its claim that the charge was due to additional programming costs for CPS tier subscribers. The City states that, since CPS subscribers with additional outlets also receive basic service over the same outlet, it does indeed have jurisdiction to regulate the charge. Additional outlets, the City contends, are equipment used to receive basic service and therefore subject to rate review by the City.

9. The jurisdiction of local franchising authorities to regulate cable television rates is limited to those charges and services associated with the basic service tier.[13] Charges associated solely with the CPS tier are under the Commission's jurisdiction.[14] Because most equipment-related charges imposed on the CPS tier are also imposed on the basic tier, local franchising authorities almost always regulate such charges. In rare instances, however, certain equipment-related charges may be related only to the CPS tier, such as additional programming costs for channels only carried on the CPS tier, placing the charges under Commission jurisdiction. The City does not contest Dimension's assertion that the additional outlet charges at issue are imposed only on CPS subscribers to recover programming costs associated with the CPS tier. Because the additional outlet charges are imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[15] Under the facts of this case, the City should not have issued a ruling regarding these charges. Since the City did not have jurisdiction to reach the additional outlet charge, we remand this issue to the City so that it may modify its local rate order accordingly.

C. Franchise Fees

10. Dimension next contends that the City improperly excluded a portion of its franchise fees ($33,703) from Dimension's rate justification calculations. Dimension included the franchise fees as part of its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393. Dimension argues that the Commission's benchmark rates were calculated by excluding the franchise fee expense on programming service revenues, but not the franchise fee expense on equipment revenues. Dimension claims the City's exclusion of franchise fees from its equipment revenue resulted in a substantial understatement of

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la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[12] We need not address Dimension's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Dimension's appeal on this issue.

[13] *See* 47 U.S.C. § 543(a)(2)(B) (1992).

[14] *Id.*

[15] In Times Mirror Cable Television of Orange County, Inc. (San Clemente, California), 10 FCC Rcd 788, 795-96 (Cab. Serv. Bur. 1994), *app. for rev. pending*, we found this charge to be unreasonable and ordered the operator to eliminate it.

its base rate per channel. The City contends that allowing Dimension to include within Line 204 equipment revenues allocable to franchise fees yields a double recovery, once for the amount that effectively becomes embedded in Line 204 and again as franchise fees are added as a pass-through to the maximum permitted rates.

11. The franchise fee issue raised by Dimension's appeal was addressed in one of our cable programming service rate orders, *Times Mirror Cable Television of Orange County, Inc.* (San Clemente, California), 10 FCC Rcd 788 (Cab. Serv. Bur. 1994) (*"Times Mirror - San Clemente"*). In *Times Mirror - San Clemente*, we stated that, if franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates (as a pass-through), the operator would recover these costs twice.[16] We find that, in accordance with *Times Mirror - San Clemente*, Dimension should not be allowed to include $33,703 of its franchise fees, from its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393, in justifying its rates for basic cable service, equipment and installations. Accordingly, Dimension's appeal of this issue is denied.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that Dimension's appeal, with respect to the issues of the regulatory status of its a la carte package and additional outlet charge outlet issue, IS GRANTED. IT IS FURTHER ORDERED that Dimension's appeal, with respect to these two issues, IS REMANDED to the City for resolution in accordance with the terms of this Order.

13. IT IS FURTHER ORDERED that Dimension's appeal, with respect to the issue of including franchise fees as a part of equipment revenue on Form 393, IS DENIED.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] *Times Mirror - San Clemente*, 10 FCC Rcd at 793-94.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE
TELEVISION OF ORANGE
COUNTY, INC. d/b/a
DIMENSION CABLE SERVICES

Appeal of Local Rate
Order of the City of San
Juan Capistrano, California

ORDER

Adopted: March 8, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 3, 1994, Time Mirror Cable Television of Orange County, Inc. d/b/a Dimension Cable Services ("Dimension"), filed with the Commission an appeal of the local rate order adopted on October 4, 1994 by the City of San Juan Capistrano, California (the "City").[1] In its local order, the City established Dimension's rates for basic cable service, equipment, installations and hourly service charges. As part of this decision setting the basic tier rates, the City found Dimension's collective or package offering ("Preferred Dimension" package) of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of the local order. The City ordered Dimension to make refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 14, 1994.[2]

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[7]

3. Dimension objects to the City's decision to calculate maximum initial permitted rates for basic services by treating Dimension's a la carte package, consisting of American Movie Classics, Turner Network Television, The Discovery Channel and The Nashville Network, as a rate regulated offering. Dimension argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[8] Dimension also objects to the City's decision to not allow its additional outlet charge to cable programming service subscribers and to the City's decision to not allow Dimension to allocate franchise fees to its equipment revenues on Form 393. We address each issue in turn.

II. DISCUSSION

A. A La Carte Offerings

4. Dimension objects to the City's finding that the channels comprising its Preferred Dimension a la carte package must be included as regulated channels. Dimension argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[9] Dimension further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Dimension's a la carte channels constituted "retroactive rulemaking."[10] The City responds that it properly applied

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[1] The City filed its opposition on November 14, 1994 to which Dimension filed a reply on November 30, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) (1992) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[3] 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[5] *Id.*

[6] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[7] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[8] *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[9] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[10] In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a

the Commission's guidelines on a la carte packages and concluded that the channels in Dimension's package should be treated as regulated channels.

5. The Dimension a la carte package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its system which serves the City. Dimension states that its September 1, 1993 restructuring involved offering four channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services, Oceanside, California*, 10 FCC Rcd 7311 (Cab. Serv. Bur. 1994). In *Dimension Cable Services*, we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 93-286, Fifth Report and Order*, 10 FCC Rcd 1226 (1995) ("*Going Forward Order*").[11]

7. We find that the City's determination in its local rate order that the channels comprising Dimension's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Dimension's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.[12]

B. Additional Outlet Charges

8. Dimension next contends that the City improperly disallowed its additional outlet charge. Dimension claims, and the City does not dispute the claim, that the charge is assessed to recover additional program supplier costs for the cable programming service (CPS) tier and therefore only subscribers receiving the CPS tier are assessed the additional charge. Characterizing the charge as related exclusively to programming costs for its CPS tier, Dimension further contends that the City lacked jurisdiction to rule on the matter. The City counters that Dimension did not adequately justify its claim that the charge was due to additional programming costs for CPS tier subscribers. The City states that, since CPS subscribers with additional outlets also receive basic service over the same outlet, it does indeed have jurisdiction to regulate the charge. Additional outlets, the City contends, are equipment used to receive basic service and therefore subject to rate review by the City.

9. The jurisdiction of local franchising authorities to regulate cable television rates is limited to those charges and services associated with the basic service tier.[13] Charges associated solely with the CPS tier are under the Commission's jurisdiction.[14] Because most equipment-related charges imposed on the CPS tier are also imposed on the basic tier, local franchising authorities almost always regulate such charges. In rare instances, however, certain equipment-related charges may be related only to the CPS tier, such as additional programming costs for channels only carried on the CPS tier, placing the charges under Commission jurisdiction. The City does not contest Dimension's assertion that the additional outlet charges at issue are imposed only on CPS subscribers to recover programming costs associated with the CPS tier. Because the additional outlet charges are imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[15] Under the facts of this case, the City should not have issued a ruling regarding these charges. Since the City did not have jurisdiction to reach the additional outlet charge, we remand this issue to the City so that it may modify its local rate order accordingly.

C. Franchise Fees

10. Dimension next contends that the City improperly excluded a portion of its franchise fees ($33,703) which Dimension included as part of its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393. Dimension argues that the Commission's benchmark rates were calculated by excluding the franchise fee expense on programming service revenues, but not the franchise fee expense on equipment revenues. Dimension claims the City's exclusion of franchise fees from its equipment revenue resulted in a substantial understatement of its base rate per channel. The City contends that allowing Dimension to include within Line 204 equipment revenues al-

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la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[12] We need not address Dimension's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Dimension's appeal on this issue.

[13] *See* 47 U.S.C. § 543(a)(2)(B) (1992).

[14] *Id.*

[15] In Times Mirror Cable Television of Orange County, Inc. (San Juan Capistrano, California), 10 FCC Rcd 845, 851-52 (Cab. Serv. Bur. 1994), *app. for rev. pending*, we found this charge unreasonable and ordered the operator to eliminate it.

locable to franchise fees yields a double recovery, once for the amount that effectively becomes embedded in Line 204 and again as franchise fees are added as a pass-through to the maximum permitted rates.

11. The franchise fee issue raised by Dimension's appeal was addressed in one of our cable programming service rate orders, *Times Mirror Cable Television of Orange County, Inc.* (San Juan Capistrano, California), 10 FCC Rcd 845 (Cab. Serv. Bur. 1994) (*"Times Mirror-San Juan Capistrano"*). In *Times Mirror - San Juan Capistrano,* we stated that, if franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates (as a pass-through), the operator would recover these costs twice.[16] We find that, in accordance with *Times Mirror - San Juan Capistrano,* Dimension should not be allowed to include $33,703 of its franchise fees, from its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393, in justifying its rates for basic cable service, equipment and installations with the City. Accordingly, Dimension's appeal of this issue is denied.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that Dimension's appeal, with respect to the issue of the regulatory status of its a la carte package and the additional outlet charge outlet issue, IS GRANTED. IT IS FURTHER ORDERED that Dimension's appeal, with respect to these two issues, IS REMANDED to the City for resolution in accordance with the terms of this Order.

13. IT IS FURTHER ORDERED that Dimension's appeal, with respect to the issue of including franchise fees as a part of equipment revenue on Form 393, IS DENIED.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] *Times Mirror - San Juan Capistrano,* 10 FCC at 850-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNITY CABLEVISION
COMPANY d/b/a DIMENSION
CABLE SERVICES

Appeal of Local Rate
Order of the City of
Irvine, California

ORDER

Adopted: March 9, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 30, 1994, Community Cablevision Company, d/b/a Dimension Cable Services ("Dimension"), filed with the Commission a Petition for Review of Rate Order of the local rate order adopted by the City of Irvine, California (the "City").[1] In its local order, the City established Dimension's rates for basic cable service, equipment, installations and hourly service charges. As part of this decision setting the basic tier rates, the City found Dimension's collective or package offering ("Preferred Dimension" package) of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The City ordered Dimension to make refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 14, 1994.[2]

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission sdecision on appeal.[6] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[7]

3. Dimension objects to the City's decision to calculate maximum initial permitted rates for basic services by treating Dimension's a la carte package, consisting of American Movie Classics, Turner Network Television, The Discovery Channel and The Nashville Network, as a rate regulated offering. Dimension argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[8] Dimension also objects to the City's decision to disallow its additional outlet charge to cable programming service subscribers and to the process given Dimension in reaching that decision. We address each issue in turn.

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[1] On August 9, 1994, the City adopted a rate order, which by its own terms did not become final and effective until August 31, 1994, establishing Dimension's equipment and installation rates and also addressing the a la carte package at issue here. The City filed its opposition on October 11, 1994. On October 21, 1994, both parties filed a Joint Emergency Motion to Withdraw and Refile Pleadings, based on the fact that both the appeal and opposition contained documents, including some that Dimension contends are confidential, that were not reviewed or used by the City in its rate-setting process. In their joint motion, the parties also requested that the re-submitted pleadings, which were filed simultaneously with their motion, be deemed to have been filed *nunc pro tunc*, so that the filing date of Dimension's appeal would continue to be considered September 30, 1994 and the filing date of the City's opposition would continue to be considered October 11, 1994. We grant the parties' joint motion and will keep the original filing dates of their pleadings. In reaching the merits of Dimension's appeals, we have not reviewed nor in any way relied on either of the parties's earlier filed pleadings. We also note that Dimension filed a Reply to the City's (resubmitted) opposition on October 28, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[3] 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[5] *Id.*

[6] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[7] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[8] *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

II. DISCUSSION

A. A La Carte Offerings

4. Dimension objects to the City's finding that the channels comprising its Preferred Dimension a la carte package must be included as regulated channels. Dimension argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[9] Dimension further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Dimension's a la carte channels constituted "retroactive rulemaking."[10] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Dimension's package should be treated as regulated channels.

5. The Dimension a la carte package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its Oceanside system. Dimension states that its September 1, 1993 restructuring involved offering four channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services, Oceanside, California*, 9 FCC Rcd 7311 (Cab. Serv. Bur. 1994). In *Dimension Cable Services*, we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 92-215, Fifth Report and Order*, 10 FCC Rcd 1226 (1995) ("*Going Forward Order*").[11]

7. We find that the City's determination in its local rate order that the channels comprising Dimension's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Dimension's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.[12]

B. Additional Outlet Charges

8. Dimension next contends that the City improperly disallowed its additional outlet charge. Dimension claims that the charge is assessed to recover additional program supplier costs for the cable programming service (CPS) tier and therefore only subscribers receiving the CPS tier are assessed the additional charge. The City does not dispute Dimension's assertion that only CPS subscribers are assessed the charge. Characterizing the charge as related exclusively to programming costs for its CPS tier, Dimension further contends that the City lacked jurisdiction to rule on the matter. The City counters that Dimension did not adequately justify its claim that the charge was due to additional programming costs for CPS tier subscribers. The City states that, since CPS subscribers with additional outlets also receive basic service over the same outlet, it does indeed have jurisdiction to regulate the charge. Additional outlets, the City contends, are equipment used to receive basic service and therefore subject to rate review by the City. Dimension also contends that the City violated the Commission's due process rules by not giving Dimension advance notice of its intention to disallow the additional outlet charge. The City counters that it followed the Commission's procedural and due process rules in all respects.

9. The jurisdiction of local franchising authorities to regulate cable television rates is limited to those charges and services associated with the basic service tier.[13] Charges associated solely with the CPS tier are under the Commission's jurisdiction.[14] Because most equipment-related charges imposed on the CPS tier are also imposed on the basic tier, local franchising authorities almost always regulate such charges. In rare instances, however, certain equipment-related charges may be related only to the CPS tier, such as additional programming costs for channels only carried on the CPS tier, placing the charges under Commission jurisdiction. The City does not contest Dimension's assertion that the additional outlet charges at issue are imposed only on CPS subscribers to recover programming costs associated with the CPS tier. Because the additional

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[9] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[10] In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order* at 4214.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[12] We need not address Dimension's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Dimension's appeal on this issue.

[13] *See* 47 U.S.C. § 543(a)(2)(E) (1992).

[14] *Id.*

outlet charges are imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[15] Under the facts of this case, the City should not have issued a ruling regarding these charges. Since the City did not have jurisdiction to reach the additional outlet charge, we remand this issue to the City so that it may modify its local rate order accordingly.[16]

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that Dimension and the City's joint motion to withdraw and refile pleadings IS GRANTED. IT IS FURTHER ORDERED that the parties's request to have the new pleadings treated as filed *nunc pro tunc* IS GRANTED.

11. IT IS FURTHER ORDERED that Dimension's appeal, with respect to the issue of the regulatory status of its a la carte package and the additional outlet charge issue, IS REMANDED to the City for resolution in accordance with the terms of this Order.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[15] *See* Times Mirror Cable Television of Orange County (Orange County, California), 10 FCC Rcd 798, 805 (Cab. Serv. Bur. 1994), *app. for rev. pending* (we found this charge to be unreasonable and ordered the operator to eliminate it).

[16] In light of our ruling here, Dimension's argument that it was denied due process by the City's actions regarding the additional outlet charges is moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television I
Los Angeles, California — CUID No. CA0253, Area G

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1995; Released: March 17, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Century Southwest Cable Television I ("Century") was charging for its cable programming service ("CPS") tiers in Los Angeles, California, CUID No. CA0253, Area G. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint was served on Century on October 6, 1993.[11] The Commission received the complaint on November 9, 1993.

5. Century states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier, Century stated that it began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an FCC Form 393 for Los Angeles, Area G, for the first time on February 7, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed October 6, 1993 and states that it was mailed to Century on on that date. Century has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider October 6, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

6. On February 23, 1995, Century amended its FCC Form 393 in response to a Commission letter which requested clarification of Century's showing.[14] On February 27, 1995, Century submitted documents explaining that Century had further restructured its service offerings on April 1, 1994. Specifically, Century removed the Arts and Entertainment ("A&E") channel and Video Hits 1 ("VH1") channel from the Century Select packages and replaced those channels with Court TV and ESPN2. A&E and VH1 were insteadoffered as a separate, two-channel CPS tier for $1.34 per month (plus franchise fee). This newly-created A&E/VH1 Satellite Tier was provided free of charge to subscribers who purchased seven or more Century Select channels.

7. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review.

III. DISCUSSION

8. In its amended benchmark filing of February 23, 1995, Century calculated a maximum permitted rate for the Century Select 12 tier of $8.09 per month (plus franchise fee). Century did not, however, attempt to justify either its monthly price of $4.00 (plus franchise fee) for the Century Select 6A and 6B tiers or its monthly price of $1.34 (plus franchise fee) for the A&E/VH1 Satellite Tier. Upon review, we have found no apparent errors that would result in Century's price for the Century Select 12 tier exceeding the maximum permitted price. We further find that Century's prices for the Century Select 6A and 6B tiers and the A&E/VH1 Satellite Tier are less than or equal to the maximum permitted prices for these tiers.

9. In light of our conclusion that Century's actual prices for its CPS tiers did not exceed its maximum permitted prices, it is unnecessary to grant Century's motion to defer action as applied to this case.

IV. CONCLUSIONS

10. Upon review of the record herein, we conclude that, for the period from November 9, 1993 to May 14, 1994, Century's showing supports as reasonable its CPS tier prices of $6.00 per month (plus franchise fee) for the Century Select 12 tier and $4.00 per month (plus franchise fee) for the Century Select 6A and 6B tiers. We further conclude that, for the period from April 1, 1994 to May 14, 1994, Century's showing supports as reasonable its price of $1.34 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.[15]

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 6, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television I in Los Angeles, California, CUID No. CA0253, Area G, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television I, with respect to Los Angeles, California, CUID No. CA0253, Area G, for the period November 9, 1993 to May 14, 1994, justifies its prices of $6.00 per month (plus franchise fee) for the Century Select 12 tier and $4.00 per month (plus franchise fee) for the Century Select 6A and 6B tiers.

13. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television I, with respect to Los Angeles, California, CUID No. CA0253, Area G, for the period April 1, 1994 to May 14, 1994, justifies its price of $1.34 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[14] Letter from Julia Buchanan, FCC, to Seth Davidson, counsel for Century (February 16, 1995).

[15] These findings are based solely on the representations of Century listed in paragraphs 5 and 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Delta Cablevision, Inc. MS0031 Greenville, MS

Withdrawal of FCC Form 329
Rate Complaint

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. On May 30, 1994, a single rate complaint was filed alleging that the prices charged by Delta Cablevision, Inc. (Delta) in Greenville, Mississippi for cable programming service tier (CPS) services were unreasonably high. On June 7, 1994, the complainant withdrew this complaint, stating that she was and is satisfied with the service and prices. This complainant was the only complainant who has filed a complaint with this Commission against the CPS prices in this community. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of this complaint, and our review of this case will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[4] The Commission subsequently revised its rate regulations effective May 15, 1994.[5] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[6]

4. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. The sole complaint against Delta in this community has been withdrawn. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[7] Because our review of the rate justification showing is predicated on the existence of a rate complaint, and because Delta no longer faces a rate complaint, we are terminating our review for this community.

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that permission to withdraw the FCC Form 329 rate complaint against the cable programming service rates of Delta Cablevision, Inc. in Greenville, Mississippi, MS0031, IS GRANTED, and our review of this case IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration*); 47 C.F.R. § 76.922(b).

[6] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[7] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) *(Rate Order)* at 5669.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF
WASHINGTON, INC.

Appeals of Local Rate Orders of the following Cities:

Lacey, Washington WA0166
Olympia, Washington WA0008

CONSOLIDATED ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. By this Order, we consolidate two proceedings involving TCI Cablevision of Washington, Inc. ("TCI") and rule on the merits in each proceeding. In deciding this matter, the Bureau has reviewed all the pleadings filed in the separate proceedings. We have determined that the proceedings are sufficiently similar to justify the resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.[1] Specifically, the Bureau resolves in this Consolidated Order the two separate Appeals of Local Cable Rate Order issued by the local franchising authorities, the Cities of Lacey and Olympia, Washington ("the Cities").[2] The rate orders establish new regulated rate schedules for TCI's basic service tier rates.[3] Specifically, the Cities' rate orders require TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to July 14, 1994. The Cities did not file responses to TCI's appeals.

2. In their reviews of TCI's Form 1200, the Cities rejected TCI's permitted rates for its basic service tier, ruling that TCI erroneously provided an entry on Line C6 of its Form 1200 – "Number of Additional Outlets in Fiscal Year 1993," even though it did not charge for additional outlets during that period. TCI argues that by disallowing the entry for additional outlets, the Cities have improperly reduced TCI's maximum permitted rate. TCI also contends that the Cities impermissibly required TCI to calculate refunds from July 14, 1994 until the basic rate is lowered, because the Cities would not consider intervening changes which could be be reflected in TCI's maximum permitted rates.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse afranchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 1200 is the official form used to determine whether regulated rates for programming, equipment and installations are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994 or upon the expiration of the deferral period provided under our rules for operators to comply with the revisions to our rules.[8] Through the use of Form 1200, an operator calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum permitted rates.

5. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates but have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per

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[1] TCI is represented in these appeals by the same law firm. Except for minor factual variations, the two separate appeals are identical and raise the same issues: whether TCI's additional outlet entry on Line C6 of Form 1200 was properly "zeroed" out and whether TCI should be able to offset against its refund liability intervening changes prior to its compliance with the rate orders.

[2] Lacey's Rate Order was issued on November 28, 1994, and Olympia's Rate order was adopted on December 13, 1994. Along with its Appeals of Local Cable Rate Order, TCI also filed Requests for Emergency Stay on December 28, 1994 for Lacey and on January 11, 1995 for Olympia. The Cities have not filed an opposition to the stay petitions. Because we are resolving this dispute on the merits presented in the appeals, the petitions for stay have been rendered moot.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] *See* 47 C.F.R. § 76.944.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731(1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket 92-266, FCC 94-40, 9 FCC Rcd 4316, 4345 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

[8] *See* Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119 (1994) (*"Second Recon. Order"*).

subscriber, per month basis. The operator's March 31, 1994 actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost taken from Form 1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.[9]

6. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes since September 30, 1992 with respect to subscribers, regulated channels, and satellite channels. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate, and are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs and inflation that justify rate increases.

A. Line C6 of Form 1200

7. In computing its benchmark rate level in Module C, an operator is required to provide entries for the various benchmark variables. The benchmark formula is intended to derive a rate level which approximates the level a similarly-situated operator subject to competition would charge. The benchmark rate level is determined by considering several variables, such as the number of subscribers, the number of channels, and the number of additional outlets charged, all of which affect the benchmark rate level.[10] The benchmark formula's only function in the new system is to determine which operators are "low-priced" operators subject to transition relief and therefore not required to set their rates based on their full reduction rates.[11] An operator with (i) a current, i.e., March 31, 1994, rate level below the benchmark rate level or (ii) a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark, is a low-priced operator.[12] The low-priced operator with a current rate level below the benchmark generally does not have to reduce its rate level, and the low-priced operator with a current rate level above the benchmark rate level but with a full reduction rate level below the benchmark is required to reduce its rate level only to the benchmark.[13]

8. Included among the variables used in the benchmark formula is the number of additional outlets in fiscal year 1993, which is entered on Line C6. TCI provided an entry of 30,721 for additional outlets in each 1200 filing, which was disallowed by the Cities because TCI did not charge subscribers for the additional outlets.[14] The Cities recalculated TCI's benchmark by entering zero for the number of outlets on Line C6, which TCI states resulted in a reduction in the operator's maximum permitted basic tier rate of $ 0.17 per month. TCI argues that there was a cost of providing additional outlets even though no charge was made, and that an operator such as itself that "bundled" its additional outlet costs into its other rates cannot charge as high a rate as an otherwise identical operator that separately itemized its additional outlets.

9. Our instructions for Line C6 of Form 1200 ask the operator to provide the average monthly number of additional outlets for which there was a charge to subscribers in fiscal year 1993, and to compute the average number of additional outlets over only those months in the year for which there was a charge for additional outlets.[15] A Benchmark Fact Sheet further explaining our instructions for calculating an operator's benchmark rate restates this instruction.[16] Neither our rules, nor our instructions for completing Form 1200, permit operators to include additional outlets for which no charge is assessed on Line C6 as a benchmark variable. The Cities' disallowances of TCI's entry for Line C6 were in accordance with the instructions to the Form 1200.

10. TCI believes that its failure to charge for a service, for which it could have charged, unfairly reduces its benchmark rate level. This is essentially an argument challenging the reasonableness of the revised benchmark formula and our rules. The revised benchmark formula is designed to approximate the rate level of a similarly situated operator facing competition. The Commission's rate survey upon which the benchmark formula was based requested data on additional outlets for which a fee was charged.[17] To ensure consistency in the application of the benchmark formula, we must disallow consideration of additional outlets for which there was no charge.[18] Because

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[9] A small operator, i.e., an operator with 15,000 or fewer subscribers that is not affiliated with a larger operator, may keep its regulated revenue at its March 31, 1994 levels, and so is not required to complete its benchmark in Module C. Its provisional rates are determined by completion of Module D.

[10] *See Second Recon. Order*, 9 FCC Rcd at 4177-78.

[11] *See* 47 C.F.R. § 76.922.

[12] *Id.*

[13] *Id.*

[14] TCI entered 30,721 on Line C6 in its Lacey filing.

[15] Instructions for FCC Form 1200, Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994 at 17.

[16] "Enter the average monthly number of additional outlets charged to subscribers in your fiscal year 1993. Include all additional residential outlets for each subscriber, other than the primary outlet. This average should be computed over just those months for which there was a charge for additional outlets." Fact Sheet, *Benchmark Fact Sheet* at 3 (Apr. 29, 1994).

[17] *See* FCC Cable TV Rate Survey, Schedules 7 and 12, Line 14 (Dec. 1992).

[18] Operators who are dissatisfied with the rates they are permitted to charge under the benchmark rules have the option to submit a cost of service showing using Form 1220 or Form 1225. *See* 47 C.F.R. § 76.922(b).

the Cities' decision in this regard was reasonable, we deny TCI's appeals of the Cities' disallowance of its entry on Line C6 of Form 1200.

B. Calculating Refund Liability

11. TCI next alleges that the Cities improperly ordered refunds for the time period "from July 14, 1994 until the basic rate is lowered in accordance with [the Cities'] Order."[19] TCI argues that the Cities' orders fail to account for any intervening upward rate adjustments to which TCI would be entitled under our rules. TCI argues that based on our decisions concerning offsetting,[20] it must be credited for increases which it would have been allowed to make to its maximum permitted rates, even if it had not yet requested or implemented the rate adjustments.

12. Under our rules, a rate adjustment with respect to basic rates only becomes effective once it has been approved by the regulator or once the review period for such approval has lapsed.[21] An operator's per month refund liability, i.e., the difference between the amount actually charged and the permitted rate, continues at the same level until the operator reduces its actual rate or the operator, in accordance with our rules, obtains increases its maximum permitted rate. The per month refund liability does not decrease just because the operator might be able to increase its rates but did not do so. For example, if TCI's programming costs increased on December 20, 1994, but the Form 1210 subsequently filed on January 2, 1995 was not approved until March 1, 1995, TCI's maximum permitted rates could only increase on March 1, 1995. TCI's refund liability, if it had not yet reduced its rates, would be based on the difference between its actual rates and the rates established by the Cities' orders from July 14, 1994 through February 28, 1995. Beginning March 1, 1995, the refund would be based on thedifference between TCI's actual rate and the new approved rate until the reduction is implemented or until the next increase is approved. Should TCI's rates that are approved pursuant to Form 1210 equal or exceed its current rates, no further refund liability would accrue as of the date of such approval.

13. We recognize that time passes between documentation of cost increases and implementation of rate increases in our present regulatory scheme.[22] Franchising authorities require sufficient time to review rate justifications so they can protect subscribers from potentially unreasonable rate increases.[23] The passage of time affects all operators in the same manner. However, were we to allow operators whose rates are above their maximum permitted rates to reduce their refund liabilities because of cost increases without the approval of the local authorities, those operators would have an incentive to delay complying with local orders that directed that their rates be reduced to maximum permitted levels. Those operators would also gain an advantage over operators who had set their rates at maximum permitted levels and must await approval from local authorities before increasing their rates.

14. TCI's reference to our offsetting cases, in which we have held that refund liability is computed by comparing the operator's aggregate revenues to revenues that would have been realized from maximum permitted rates, is misplaced. Those decisions hold that the franchising authority must offset any undercharges in rates against overcharges in other rates.[24] This is completely unrelated to the situation TCI poses here, where subsequent cost increases have occurred which it claims reduce its refund liability. For the reasons set forth above, we find that the Cities' orders with respect to calculation of TCI's refunds are reasonable, and therefore TCI's appeals on this issue are denied.[25]

15. Accordingly, IT IS ORDERED that TCI of Washington, Inc.'s appeals of the local rate orders of Lacey and Olympia, Washington, regarding its entry for Line C6 of Form 1200 and the Cities' method for determining TCI's refund liability, are DENIED.

16. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] Lacey's Rate Order at 4 and Olympia's Rate Order at 3.
[20] TCI cites TCI Cablevision of North Central Kentucky, DA 94-1479 (Dec. 14, 1994).
[21] 47 C.F.R. § 76.933.
[22] *See Rate Order*, 8 FCC Rcd at 5708-12.
[23] *Id.* at 5711.
[24] *See* TCI Cablevision of North Central Kentucky. *See also Third Recon. Order*, 9 FCC Rcd at 4353.
[25] If, prior to TCI's implementation of its refund, the City approves a higher basic rate, we assume that the City will adjust TCI's refund liability accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. — CUID No. CA0189, Whittier

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1995; Released: March 30, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 29, 1995

Released: March 31, 1995

IN REPLY REFER TO:
DA 95-645

Thomas J. Juracek
Controller, Mission Cable
11873 South Bellaire Street
Suite 1550
Denver, CO 80222

Dear Mr. Juracek:

This letter is in reference to your letter dated March 28, 1995, with respect to a complaint filed February 25, 1994, against the price Mission Cable was charging for cable programming service in the City of Abernathy, Texas, CUID No. TX1027. In that letter, you state that Mission Cable is not required to justify its rates prior to May 15, 1994, because Mission Cable's Abernathy, Texas system has fewer than 1,000 subscribers. Based on the information you have provided, it appears that the Abernathy system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until **May 15, 1994**.

We will rule at a later date on Mission Cable's justification under the Commission's revised rate regulations of its cable programming service rates in Abernathy beginning May 15, 1994. At that time, we will also consider Mission Cable's argument that the complaint is deficient because Mission Cable does not provide cable programming service in Abernathy.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

cc: City of Abernathy

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-62

In the Matter of

Amendment of Section 73.202(b), RM-8601
Table of Allotments,
FM Broadcast Stations.
(Linden, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 3, 1995; Released: May 11, 1995

Comment Date: July 3, 1995
Reply Comment Date: July 18, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Cass County Radio ("petitioner"), requesting the allotment of Channel 257C3 to Linden, Texas, as the community's first local aural transmission service. Petitioner states it will apply for Channel 257C3, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 257C3 to Linden,[1] since it could provide the community with its first local FM service. Channel 257C3 can be allotted to Linden in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] We note the proposed allotment of Channel 257C3 to Linden is short-spaced to Station KPYN(FM), Channel 257A, Atlanta, Texas. However, Station KPYN(FM) was modified to specify operation on Channel 261C2 pursuant to *Third Report and Order* in MM Docket No. 84-231. *See* 7 FCC Rcd 470 (1992).[3] Therefore, final licensing for Channel 257C3 at Linden may be delayed until Station KPYN(FM) is license on Channel 261C2 at the site specified in its construction permit (File No. BPH-921029IB)

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Linden, Texas		257C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested, to Ark-La-Tex Broadcasting Company, P.O. Drawer 1166, Atlanta, Texas 75551 [licensee of Station KPYN(FM)].

6. Interested parties may file comments on or before **July 3, 1995**, and reply comments on or before **July 18, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

William J. Pennington, III
5519 Rockingham Road-East
Greensboro, North Carolina 27407
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] According to the 1990 U.S. Census, Linden is an incorporated community with a population of 2,375 persons.

[2] The coordinates for Channel 257C3 at Linden are North Latitude 33-00-44 and West Longitude 94-21-55.

[3] Ark-La-Tex Broadcasting Company, licensee of Station KPYN(FM), has filed an application for a construction permit to change frequency. The Commission granted that application on September 10, 1993.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Afford-A-Call Corp.,
Complainant,

vs. File No. E-92-61

United Telephone Company of Ohio,
Defendant.

ORDER

Adopted: May 4, 1995; Released: May 11, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On April 17, 1992, Afford-A-Call Corp. ("Afford") filed the above-captioned complaint against United Telephone Company of Ohio ("United") alleging, among other things, that United violated the Communications Act by charging the higher carrier common line charge in connection with Afford's 800 telephone services. On April 14, 1995, however, the parties jointly filed a motion to dismiss this complaint with prejudice. The parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of The
Commission's Rules And
Establishment of a Joint Board

ORDER

Adopted: April 24, 1995; Released: May 11, 1995

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), the Commission appoints the Honorable Laska Schoenfelder, Chairman of the South Dakota Public Utilities Commission, to serve on this Federal-State Joint Board, which was established in 1980 to address issues related to jurisdictional separations. This appointment fills the position vacated by the late Dennis J. Nagel of the Iowa Utilities Board.[1] Henceforth a copy of all filings in this proceeding shall be served on the appointee at the following address:

The Honorable Laska Schoenfelder, Chairman
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, South Dakota 57501-5070

2. ACCORDINGLY, IT IS ORDERED, that the Honorable Laska Schoenfelder, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), is appointed to the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] *See* Letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, to the Honorable Reed E. Hundt, Chairman, Federal Communications Commission (March 27, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C & R Cablevision CUID No. TX2078
Weatherford, Texas

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1995; Released: March 30, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price C & R Cablevision ("C & R") was charging for its cable programming service ("CPS") tier in Weatherford, Texas. CUID No. TX2078, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against C & R Cable, while asserting that it challenges CPS rates, challenges only rates for equipment associated with basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, C & R filed a motion to dismiss the complaint stating that the "system has no cable programming service tier against which a complaint may be filed."[4] The channel line-up attached to the complaint supports this assertion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.

5. We have examined the complaint and C & R's motion, and we conclude that the complaint challenges only charges for equipment associated with the basic tier, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only rates for equipment associated with the basic tier are at issue. When only rates associated with the basic tier are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by C & R Cablevision in Weatherford, Texas, CUID No. TX2078, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 C.F.R. § 543(a)(1).
[4] Motion to Dismiss at 2 (Jan. 27, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Harron Communications Corp.	CUID Nos. NY0077,
New York State	NY0079, NY0084,
	NY0085

Benchmark Filings To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 1995; Released: March 14, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Harron Communications Corp. ("Harron") was charging for its cable programming service ("CPS") tier in the New York communities designated with the above-referenced CUID numbers. Harron has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Harron's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas which are the subject of this Order were completed and served on Harron and received by the Commission on the dates set forth on Appendix A.

5. Harron filed substantially identical FCC Forms 393 for the franchise areas addressed in this Order on November 15, 1993. Harron amended its justification on February 17, 1995, in response to a Commission letter which requested further clarification of Harron's showing.[11] Harron submitted additional information on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Harron asserts that its monthly CPS tier price is justified by its benchmark filings because its price is equal to the maximum permitted charge of $11.55, as calculated in the filings. Upon review of Harron's Form 393 filings, we have found that Harron has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Harron's calculations in Form 393:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Harron has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Harron implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Harron's price for the period after May 14, 1994 may be required to reflect the fact that Harron's price during the earlier period, which is used as the starting point to calculate its prices for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Gardner F. Gillespie, Esq., Counsel for Harron (Feb. 14, 1995).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994) (*"Public Notice"*); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Harron did not report any income tax expense. Harron is a Subchapter C corporation and is therefore required to pay corporate income tax.[13] By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Harron's federal income tax allowance on Column G of Schedules A and C on the basis of a 35% corporate tax rate.[14] Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[15] In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 53.85% of Harron's return on investment.

b. In its Form 393 filing of February 7, 1995, Harron incorrectly calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401). Lines 122 and 125 of Form 393 require the operator to enter Gross National Product Price Index ("GNP-PI") data for the latest quarter for which data is available that ended before the date through which the Inflation Adjustment Factor is calculated. On its most recent Form 393, Harron calculated the Inflation Adjustment Factor through October 1993. However, Harron completed Lines 122 and 125 using updated GNP-PI data for the first quarter of 1993, rather than the third quarter of 1993. Harron's calculation of the Inflation Adjustment Factor is therefore incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available in accordance with the Form 393 Instructions.[16] On its most recent Form 393, Harron entered 13 months on Line 124, indicating that its filing was as of the end of October 1993. However, with respect to CUID No. NY0079, Harron's use of the 13 months entry is impermissible. The first valid complaint in CUID No. NY0079 was served on September 20, 1993. The instructions to Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[17] The Inflation Adjustment Factor therefore must be calculated as if Harron had filed Form 393 within this 30-day period. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.028 through September 1993 for CUID No. NY0079, and an Inflation Adjustment Factor of 1.030 through October 1993 for CUID Nos. NY0077, NY0084, and NY0085.

7. Because of these errors, we conclude that Harron has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price from $11.55 to $11.40 for CUID No. NY0079 and to $11.43 for CUID Nos. NY0077, NY0084, and NY0085.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that Harron's showing supports a maximum reasonable CPS tier price of $11.40 (plus franchise fee) for CUID No. NY0079 for the period from September 23, 1993 to May 14, 1994 and a maximum reasonable CPS tier price of $11.43 (plus franchise fee) for CUID Nos. NY0077, NY0084 and NY0085 for the period from the filing of the initial valid complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[18] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that Harron must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Harron's price during the earlier period were unreasonable.[19] We reserve the right to make further adjustments to Harron's price for the period after May 14, 1994, upon completion of our review of Harron's FCC Form 1200 rate filings.

10. We further conclude that Harron has submitted in good faith optional supplemental filings in response to our *Public Notice*. As provided in the *Public Notice*, we will

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[13] *See* Harron's filing on FCC Form 1205, page 1 (filed August 15, 1994).

[14] *Id.*

[15] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") *See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] *See* 47 C.F.R. § 76.956(a).

[18] This finding is based solely on the representations of Harron listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] We reviewed Harron's FCC Form 1200 rate filings and confirmed that Harron calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

relieve Harron of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints filed on the dates set forth on Appendix A against the cable programming service price charged by Harron Communications Corp. in the Town of Marcy, New York, CUID No. NY0077; the Town of New Hartford, New York, CUID No. NY0079; the Village of Whitesboro, New York, CUID No. NY0084; and the Town of Whitestown, New York, CUID No. NY0085, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Harron Communications Corp. with respect to the Township of New Hartford, New York, CUID No. NY0079, for the period beginning on September 23, 1993 and ending on May 14, 1994, justifies the maximum price of $11.40 (plus franchise fee) for Harron Communications Corp.'s cable programming service tier; and that the benchmark filings submitted by Harron Communications Corp. with respect to the Town of Marcy, New York, CUID No. NY0077; the Village of Whitesboro, New York, CUID No. NY0084; and the Town of Whitestown, New York, CUID No. NY0085, for the period beginning with the filing of the first valid complaint in each franchise area (as set forth on Appendix A) and ending on May 14, 1994, justify the maximum price of $11.43 (plus franchise fee) for Harron Communications Corp.'s cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Harron Communications Corp. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[20] to May 14, 1994 which exceeded $11.40 (plus franchise fee) per month in the Town of New Hartford, New York, CUID No. NY0079, and exceeded $11.43 (plus franchise fee) per month in the Town of Marcy, New York, CUID No. NY0077; the Village of Whitesboro, New York, CUID No. NY0084; and the Town of Whitestown, New York, CUID No. NY0085 and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Harron Communications Corp. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Harron Communications Corp. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the Town of Marcy, New York, CUID No. NY0077; the Town of New Hartford, New York, CUID No. NY0079; the Village of Whitesboro, New York, CUID No. NY0084; and the Town of Whitestown, New York, CUID No. NY0085, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $11.40 (plus franchise fee) for the Town of New Hartford, New York, CUID No. NY0079, and to equal $11.43 (plus franchise fee) for the Town of Marcy, New York, CUID No. NY0077; the Village of Whitesboro, New York, CUID No. NY0084, and the Town of Whitestown, New York, CUID No. NY0085.

16. IT IS FURTHER ORDERED that Harron Communications Corp. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Harron Communications Corp. shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0077	10/12/93	10/6/93
0079	9/23/93	9/20/93
0084	10/14/93	10/11/93
0085	10/18/93	10/13/93

[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Wometco Cable TV of Georgia, Inc. CUID No. GA0222
Duluth, Georgia

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1995; Released: March 27, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Wometco Cable TV of Georgia, Inc. ("Operator") was charging for cable service in Duluth, Georgia, CUID No. GA0222. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review a cable operator's prices for its cable programming service ("CPS") tier upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[4]

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[9]

4. The complaints filed against Operator for the community designated by the above-listed CUID number state that they are being filed to object to a rate increase for the CPS tier offered by Operator. Under the Commission's rules, a complaint regarding a rate change for the CPS tier may be filed within 45 days from the date the complainant first receives a bill reflecting the rate change.[10] However, after reviewing the record in this case, we have determined that these complaints do not relate to changes in Operator's regulated CPS rates. Rather, the complaints object to changes in Operator's rates for basic tier service, associated equipment charges for receiving basic tier service, and a la carte packages that are not subject to rate regulation. The Commission is responsible for, and its jurisdiction is limited to, regulating rates for cable programming services.[11] Accordingly, we find that we are without jurisdiction to consider the complaints discussed herein and shall dismiss them.

5. As of September 1, 1993, Operator offered subscribers a basic service tier, a CPS tier, and an a la carte package in the community addressed herein. Prior to September 1, 1993, Operator removed three channels from previously regulated tiers into an a la carte package. At the same time, Operator replaced these channels on the regulated tiers with new channels. Operator did not change its price for the preexisting CPS tier. Therefore, there was no change in the rate charged for the CPS tier that could constitute the basis for a valid complaint.

6. To the extent that these complaints object to changes in the rate charged for the basic tier and associated equipment, we lack jurisdiction to consider those complaints. Except in limited circumstances, the Commission does not act upon complaints concerning rates for that tier. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission.

7. As for Operator's a la carte package, we note that the Cable Services Bureau has released orders resolving letters of inquiry ("LOIs") regarding other, similarly structured systems.[12] Relying on the Commission's *Going Forward Order*,[13] the Bureau's orders addressed the restructured service offerings implemented beginning September 1,

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).
[2] 47 C.F.R. § 76.956.
[3] 47 C.F.R. § 76.956(b).
[4] *Id.*
[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).
[6] *See* Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*) at 4119; 47 C.F.R. § 76.922(b).
[7] *See Second Order on Reconsideration* at 4190, paras. 150-152.
[8] *Id.*
[9] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.
[10] 47 C.F.R. § 76.953(b). Complaints about rates in effect on September 1, 1993 must be filed by February 28, 1994. 47 C.F.R. § 76.953(a). Each of the complaints addressed in this Order was filed after February 28, 1994.
[11] *See* 47 U.S.C. § 522.
[12] *See, e.g.*, Cablevision Industries, Wake Forest, North Carolina, LOI 94-7 , DA 94-1550 (Cab. Serv. Bur., released Dec. 22, 1994); Comcast Cablevision, City of Tallahassee, Florida, LOI 93-2, DA 94-1275 (Cab. Serv. Bur., released Nov. 18, 1994).
[13] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

1993, in which operators eliminated or cut back CPS tiers and offered a la carte channels. In the orders that present fact patterns most similar to Operator's here, the Bureau found that the restructured service offerings do not constitute a clear evasion of our rate rules. With regard to the channels moved to a la carte packages, the orders permit the operator to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.[14] We feel that we have sufficient information regarding Operator's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way. As in the communities in the cited orders, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow Operator to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by the Operator in the community referenced above ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief
Cable Services Bureau

[14] *See, e.g.*, Century Cable Television, Memorandum Opinion and Order, DA 94-1627 (Cab. Serv. Bur. released Jan. 3, 1995), at para. 5-6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable — CUID No. FL0244
Lakeland, Florida

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 27, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Paragon Cable ("Paragon") was charging for its cable programming service ("CPS") tier in Lakeland, Florida, CUID No. FL0244. Paragon has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Paragon's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Paragon asserts that its monthly CPS price is justified by its benchmark filing because this price is lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Paragon's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Paragon Cable in Lakeland, Florida, CUID No. FL0244 IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Northland Cable Properties Two Limited Partnership
Burnet, Texas — CUID No. TX0046

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 27, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Northland Cable Properties Two Limited Partnership d/b/a Northland Cable Television ("Northland") was charging for its cable programming service ("CPS") tier in Burnet, Texas, CUID No. TX0046, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against Northland, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, Northland filed an FCC Form 393 which showed that it offered only one tier of cable service. The channel line-up and rate card that Northland submitted with its FCC Form 1200 support this conclusion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.

5. We have examined the complaint and Northland's FCC Forms 393 and 1200, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Northland Cable Properties Two Limited Partnership d/b/a Northland Cable Television, in Burnet, Texas, CUID No. TX0046, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 C.F.R. § 543(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ventura County Cablevision — CUID No. CA0303, Thousand Oaks CA

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Ventura County Cablevision ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above.[1] Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[12]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] In addition to complaining about Operator's CPS rate as of the date the complaint was filed, the complainant also alleges that even though Operator restructured its rates effective September 1, 1993, Operator did not increase the number of channels on the CPS tier consistent with its restructured rate until October 31, 1993. Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b). In this case, the earliest valid complaint was filed on December 13, 1993. Since Operator increased the number of CPS channels before the date the complaint was filed, we do not have jurisdiction to consider the reasonableness of Operator's rate before the channel increase.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Southwestern Cable TV CUID No. CA0572, Poway CA

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Southwestern Cable TV ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Donrey Cablevision CUID No. CA0388, Vallejo CA

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: March 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Donrey Cablevision ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Newhouse Broadcasting Corporation

Request for Stay

ORDER

Adopted: March 24, 1995; Released: March 28, 1995

By the Chief, Cable Services Bureau:

1. On March 1, 1995, Newhouse Broadcasting Corporation ("Newhouse") filed with the Cable Services Bureau a request for deferral of action on complaints regarding the rates Newhouse cable operators have charged for cable programming service ("CPS") tiers in various areas, based on the pendency before the Commission of Newhouse's application for review of recent decisions regarding Letter of Inquiry ("LOI") investigations. Newhouse notes that the Bureau has previously agreed not to defer action, but to stay the effectiveness of actions implicating issues common to CPS complaints and LOI orders.[1] Noting that the Bureau has since adopted orders resolving rate complaint cases in a number of Newhouse service areas, and that additional rate complaint cases are pending, Newhouse requests a blanket stay of the effectiveness of such orders pending resolution of the LOI review.

2. Newhouse notes that, even in Newhouse systems that were not subject to LOI proceedings, the issues involved in the LOI and CPS rate complaint cases are identical, and the Commission's resolution of the LOI cases will affect the Bureau's handling of the CPS rate complaints. Newhouse also refers to the Bureau's statement that consumers would not be harmed by such a stay, since the stay would be lifted, and any refunds ordered would be paid with interest, in case of the Commission's upholding the Bureau's LOI decisions. Newhouse notes that the Bureau released a series of orders resolving CPS rate complaints in various Vision Cable communities in North Carolina,[2] and states that the pending LOI issues were involved, so that a stay of the effectiveness of those orders would be appropriate.

3. We have considered the arguments made, and believe it would be appropriate to stay the effectiveness of any action pursuant to our orders with respect to Newhouse CPS complaints (including the running of any time periods set forth in those orders) until the Commission releases a decision on the applications for review of the Bureau's LOI decisions regarding the treatment of the relevant a la carte packages.

4. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that the effectiveness of any action pursuant to our orders with respect to complaints against Newhouse Broadcasting Corporation or any of its members, regarding the prices charged for cable programming services, IS STAYED pending Commission resolution of pending review of Newhouse Broadcasting Corporation Letter of Inquiry proceedings.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Letter from Meredith J. Jones to Brenda L. Fox, Feb. 27, 1995.

[2] *See, e.g.*, Vision Cable of Wilmington, Memorandum Opinion and Order, DA 95-293 (Cab. Serv. Bur.) (released Feb. 22, 1995); Vision Cable of Wilmington, Memorandum Opinion and Order, DA 95-298 (Cab. Serv. Bur.) (released Feb. 22, 1995); Vision Cable of Shelby, Memorandum Opinion and Order, DA 95-297 (Cab. Serv. Bur.) (released Feb. 22, 1995); Vision Cable of Morehead, Memorandum Opinion and Order, DA 95-296 (Cab. Serv. Bur.) (released Feb. 22, 1995).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable of Wilmington	NC0408, NC0409
Vision Cable of Jacksonville	NC0283, NC0585, NC0586
Vision Cable of Houma	LA0013, LA0224
Vision Cable of Alpine	LA0007, LA0051, LA0431, LA0226, LA0104
Vision Cable of Shelby	NC0523, NC0756

Withdrawal of FCC Form 329
Rate Complaints

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: April 3, 1995

By the Deputy Chief, Cable Services Bureau:

1. For each of the communities listed above, complaints were filed alleging that the prices charged by the Vision Cable entity named in the caption ("Vision") in that community for cable programming service tier ("CPS") services were unreasonably high. Subsequently, several complainants withdrew their complaints, stating that they were satisfied that Vision's CPS prices were, and had been, reasonable. In every case, the withdrawn complaint was the only valid complaint against Vision in that community. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of these complaints, and our review of these filings will be terminated.

2. In addition, Vision has requested that the Bureau accept withdrawals of complaints in communities where the Bureau has already issued a memorandum opinion and order addressing the reasonableness of Vision's CPS prices. Vision further requests that the Bureau vacate its existing orders insofar as they address the CPS prices in communities from which the Bureau has received letters seeking to withdraw all valid complaints.[1] We find that it would not be in the public interest, however, to permit withdrawal of a complaint after a refund order has been issued. We will not revisit such an order outside the context of a petition for reconsideration or an application for review from the subject operator. We are accordingly confining the scope of this Order to communities for which no Bureau memorandum opinion and order has been released.[2]

3. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

4. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.

5. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] Be-

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[1] *See, e.g.*, Letter from Seth Davidson, for Vision Cable of Wilmington, to Meredith Jones, Chief, Cable Services Bureau (Feb. 27, 1995). Morehead City, NC, and Shelby, NC are other such communities.

[2] The Wilmington Orders, DA 95-293 and DA 95-298, both released Feb. 22, 1995, included CUID Nos. NC0167, NC0172, NC0229, NC0270, and NC0862; and CUID Nos. NC0016, NC0041, NC0140, and NC0692. In this Order, we do not consider withdrawal letters from those communities, but only for two other communities served by Vision Cable of Wilmington, CUID Nos. NC0408 and NC0409, for which no orders have been released. Similarly, the Shelby Order, DA 95-297, released Feb. 22, 1995, included CUID Nos. NC0279, NC0521, NC0522, NC0524, NC0693, NC0694, NC0757, NC0816, NC0839, and NC0843. In this Order, we do not consider withdrawal letters from those communities, but only from two other communities served by Vision Cable of Shelby, CUID Nos. NC0523 and NC0756, for which no orders have been issued.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration*); 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

cause our review of the rate justification showing is predicated on the existence of a rate complaint, in those communities where Vision no longer faces a rate complaint, we will terminate our review of Vision's filing.[10]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that permission to withdraw the FCC Form 329 rate complaints against the cable programming service rates of the Vision Cable entities captioned above IS GRANTED.

7. IT IS FURTHER ORDERED that the review of the rate justification filings in the communities listed above IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[10] In Jacksonville, where, our research shows, one valid complaint remains, our review will continue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Colony Cablevision of Florida	CUID Nos. FL0348,
Collier County, Florida	FL0098, FL0050

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the prices Colony Cablevision of Florida ("Operator") was charging for its cable programming service ("CPS") tiers in Collier County, Florida, CUID Nos. FL0348, FL0098, and FL0050. Operator has chosen to attempt to justify its prices through a single benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely complaint for all three CUID areas covered by this Order was served on Operator by the local franchising authority on January 20, 1994. The Commission received the complaint on February 14, 1994. In response to the complaint, Operator filed an FCC Form 393 on March 18, 1994. Operator amended its justification on June 30, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 25, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

5. Operator states that it restructured its service offerings on September 1, 1993. In addition to its basic service tier and a CPS tier called Basic Service, Operator began offering eight channels on an individual, or a la carte, basis. These a la carte channels could be purchased collectively as one eight-channel package (Cable Plus) or individually. A similar restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Operator's affiliate, Dynamic Cablevision of Florida ("Dynamic"), in Hialeah, Florida.[13] In the LOI order, we found that the retiering constituted an evasion of rate regulation. We concluded that Dynamic's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[13] *Dynamic Cablevision of Florida, Hialeah, Florida*, LOI-93-43, DA 94-1546 (Cab. Serv. Bur., released Dec. 22, 1994). In that case, Dynamic created two a la carte packages, one of which consisted of six channels that were previously offered as a separate CPS tier, and the other of which consisted of four channels that were removed from an 18-channel CPS tier.

must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms.

6. On January 23, 1995, Dynamic filed a Petition for Reconsideration which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages. Operator then filed a motion on March 9, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Florida until the Bureau rules on the Petition for Reconsideration.

III. DISCUSSION

7. In its amended benchmark filing, Operator calculated a maximum permitted rate for the Basic Service CPS tier of $8.64 per month (plus franchise fee).[14] Operator did not attempt to justify its monthly price of $2.40 for the Cable Plus tier. Upon review, we have determined that Operator has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustment to Operator's calculations in Form 393:

> a. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Operator did not count as rate-regulated or as satellite channels the eight channels in its Cable Plus package. Prior to September 1, 1993, two of these channels were offered as part of Operator's basic service tier, five channels were offered as part of a CPS tier, and one channel was not offered on this system. In several recent decisions, we have held that a la carte packages involving similar numbers and percentages of migrated channels must be treated as rate-regulated service tiers for purposes of Form 393.[15] There are no facts in the record of this proceeding that materially distinguish Operator's offering from these precedents. We therefore determine Operator's maximum permitted prices by including the eight channels of Operator's Cable Plus package as an additional CPS tier, increasing the total rate-regulated channels from 41 to 49 and the total satellite channels from 32 to 37.

8. This adjustment has the effect of decreasing the maximum permitted monthly price for the Basic Service tier to $7.06 per month (plus franchise fee). Operator's actual monthly charge for the tier was $8.64 (plus franchise fee). Therefore, the actual charge for this tier was above the maximum permitted rate and was thus unreasonable.

9. The same adjustment results in a maximum permitted rate for the Cable Plus tier of $3.32 per month (plus franchise fee). Operator's actual monthly charge for the Cable Plus tier was $2.40 (plus franchise fee). Thus, the actual charge for this tier was below the maximum permitted rate.

10. Under the Commission's rules, Operator may be liable for refunds to compensate subscribers for the overcharges described above. However, since our resolution of the issues pending in Dynamic's Petition for Reconsideration could require revisions to our analysis, we will stay the effective date of this Order in response to Operator's motion until we have issued our decision in that proceeding. Since interest charges on any required refunds will continue to accrue during the period of this stay, Operator's subscribers will not be adversely affected.

IV. CONCLUSIONS

11. Upon review of the record herein, we conclude that, for the period from February 14, 1994, to May 14, 1994, Operator's showing supports maximum reasonable CPS tier prices of $7.06 per month (plus franchise fee) for the Basic Service tier, and $3.32 per month (plus franchise fee) for the Cable Plus tier.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amounts they paid in excess of a reasonable price for the CPS tiers.

12. We further conclude that Operator must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Operator's price for the Basic Service tier during the earlier period was unreasonable.[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's rate justification for that period.

13. We futher conclude that Operator has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[18] As provided in the Public Notice, we will relieve Operator of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one yearfollowing the release of this Order.

14. We further conclude that the effective date of this Order will be stayed until the Bureau releases a decision on Dynamic's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of Dynamic's a la carte packages in Hialeah, Florida.

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[14] Operator recalculated its inflation adjustment in its January 25, 1995 amendment using Gross National Product-Price Index data released on July 29, 1994.

[15] *See, e.g., Falcon Cable TV, Southern Shores, North Carolina*, LOI 94-2, DA 94-1551 (Cab. Serv. Bur., released Dec. 22, 1994); *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur., released Dec. 22, 1994); *Vision Cable of Metrolina Inc., Cabarrus, North Carolina*, CUID Nos. NC0174 *et al.*, DA 95-294 (Cab. Serv. Bur., released Feb. 22, 1995).

[16] These findings are based solely on the representations of Operator listed in paragraph 5, *supra*, and the modifications described in paragraph 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] We reviewed Operator's Form 1200 rate filing and confirmed that it calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[18] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

15. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint against the cable programming service prices charged by Operator in Collier County, Florida, CUID Nos. FL0348, FL0098, and FL0050, IS GRANTED TO THE EXTENT INDICATED HEREIN.

16. IT IS FURTHER ORDERED that the benchmark filing submitted by Operator with respect to Collier County, Florida, CUID Nos. FL0348, FL0098, and FL0050, for the period of February 14, 1994 to May 14, 1994, justifies maximum prices of $7.06 per month (plus franchise fee) for the Basic Services tier and $3.32 per month (plus franchise fee) for the Cable Plus tier.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers for the period February 14, 1994[19] to May 14, 1994, that portion of the amounts paid for cable programming service that exceeded $7.06 per month (plus franchise fee) for the Basic Services tier and was thus unreasonable, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED that Operator shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the effective date of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

19. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(c) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(c), that Operator shall, within 30 days of the effective date of this Order, revise its Form 1200 filing for the period beginning May 15, 1994, to include the Cable Plus package as a cable programming service tier and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price determined in this Order (plus franchise fee).

20. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, CPS tier prices for Collier County, Florida, CUID Nos. FL0348, FL0098, and FL0050, that reflect the reductions in the CPS rate determined in this Order.

21. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

22. IT IS FURTHER ORDERED that Operator's motion to defer action on the complaints against its cable programming service prices in Collier County, Florida, CUID Nos. FL0348, FL0098, and FL0050, is resolved as indicated herein.

23. IT IS FURTHER ORDERED that the effective date of this Order will be stayed until the Commission releases a decision on Operator's Petition for Reconsideration of the Bureau's LOI decision regarding the treatment of its a la carte packages in Hialeah, Florida.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. OK0050
Clinton, Oklahoma

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Clinton, Oklahoma, CUID No. OK0050. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on October 8, 1993. The Commission received the complaint on October 12, 1993.[11]

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on November 18, 1993 in response to the complaint. Sammons amended its justification on July 1, 1994 and then submitted further information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of July 1, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.98 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.06 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price as of March 31, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See 47 C.F.R. § 76.922(b)(4)(C).*

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed October 8, 1993 and states that it was mailed to Sammons on that date. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider October 8, 1993 as the service date.

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.98 per month (plus franchise fee) for the period October 12, 1993 to May 14, 1994.[13] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 8, 1993 complaint against the cable programming service price charged by Sammons Communications, Inc. in Clinton, Oklahoma, CUID No. OK0050, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Clinton, Oklahoma, CUID No. OK0050, for the period of October 12, 1993 to May 14, 1994, justifies a maximum price of $7.98 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from October 12, 1993[16] to May 14, 1994 that exceeded $7.98 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Clinton, Oklahoma franchise area, CUID No. OK0050, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Clinton, Oklahoma franchise area, CUID No. OK0050, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 5, 1995

Released: May 12, 1995

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Rich Communications Corporation
464 Franklin Street
Buffalo, NY 14202

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

The Commission has received information indicating that Radio Station WGRF(FM), Buffalo, NY, may have violated 18 U.S.C. § 1464 by broadcasting allegedly indecent material during the "Norton and Stout Show" on September 1, 1993, beginning at approximately 9 a.m. A transcript of the allegedly indecent broadcast, taken from a tape submitted by the complainant, is attached.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *See Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We believe that the subject excerpts are indecent in that they contain language that describes sexual activities in patently offensive terms. The pandering manner of presentation, soliciting women callers to relate "the strangest intimate story" confided to them by a girlfriend, makes the repeated references to the "plunger lady" and "doing it with the plunger" unambiguously and graphically sexual. *Compare, e.g., KFI, Inc.*, 6 FCC Rcd 3699 (MMB 1989) ($6,000 Notice of Apparent Liability for three indecent broadcasts on KFI-AM, Los Angeles, CA, including call-in "confessions" addressing bizarre sexual behavior); see also *Rusk Corporation*, 5 FCC Rcd 6332 (MMB 1990) ($6,000 Notice of Apparent Liability for indecent broadcasts on KLOL(FM), Houston, TX, including sex survey lines to discuss "what makes your favorite hiney parts tingle"). Because the material aired at times when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on September 1, 1993, Station WGRF(FM) violated 18 U.S.C. § 1464 by airing indecent programming.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Rich Communications Corporation is hereby advised of its apparent liability for a forfeiture of Four Thousand Dollars ($4,000), for its apparent violation of 18 U.S.C. § 1464 on September 1, 1993. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Attachments

WGRF(FM), Buffalo, NY
Excerpts from Norton and Stout Show
September 1, 1993 (beginning approximately 9 a.m.)

MV: Male Voice

M2: Second Male Voice

FV: Female Voice

MC: Male Caller

FC: Female Caller

MV: A couple of minutes after nine, we can still take some more calls I guess. We got a few folks standing by to tell us about their fantasy, women who fantasize about another guy or stories they've heard from girl friends, giving away a night on the town .... we got to announce the winner some time here shortly....

* * *

MV: ... Women tell each other intimate stories. So for the most outrageous story that another woman has told you, ladies, you let us know what it is at 644-97-97 and you can win ....

* * *

MV: Classic rock station 96 point 9, Buffalo's 97 rock, Norton and Stout, and this morning we're asking for women to tell us what's the wildest story, intimate story a girl friend has maybe confessed to you, and so we're

M2: Trying to call the woman, the winner, we're kinda unanimous.

MV: Pretty much unanimous, wasn't it?

M2: Yeah. Can we say what her story was or not?

MV: Yeah. Plunger woman.

M2: Plunger woman lady.

MV: She said that a friend of hers told her, her and her husband were in the bathtub and that she was doing the plunger and her husband at the same time, as it were. (Plop sound effect)

M2: Against the wall with the plunger and

* * *

MV: Alright, we'll see if we can call this other person and track down plunger woman, because it's in the way you use it, as Eric Clapton sings here on 97 rock.

* * *

MV: Norton and Stout at 9:27, okay, we're trying to track down plunger woman.

M2: Is that who we're calling?

MV: As she's affectionately come to be known.... Joke of the day replay is coming up here next, maybe, we're just trying to track this down to see if this is, actually true.

M2: Plunger woman.

* * *

MV: And yes, we have announced the woman who told us the story about the plunger is the winner. Her name is Cindy and she said, that the strangest intimate story a friend of hers ever told her, was about a woman who was in the shower with her husband and a plunger.

M2: She was supposed to call, maybe this is her calling back.

MV: Morning, 97 rock.

FC: Good morning, I don't want to sound naive or nothing but I don't understand this plunger thing.

MV: Well, you see, you realize as a woman.

FC: Yeah.

MV: You have, how do we.

M2: Wow, how can we explain it?

MV: Well, just imagine that there was the man.

FC: He was doing it with the plunger?

MV: Yeah, and her husband at the same time.

FC: The stick of the plunger?

MV: Yeah.

FC: Oh.

MV: In another.

FC: And the husband was on the other part?

MV: Yeah.

FC: Oh, that's disgusting.

MV: You're going to try it, though, aren't you.

FC: No, no.

MV: Come on.

FC: No, I don't like the foreign stuff.

MV: (Unintelligible) What's the wildest thing you ever heard from a girl friend that they've done?

FC: I don't have one, that's why I didn't call, but I just didn't understand this, the plunger thing. I didn't know what she would be doing.

MV: Well, Mark didn't understand either so you're not alone.

FC: See, you'll have to explain it to him.

MV: Okay, thank you.

FC: Thank you.

MV: Well, we're trying to track down the story here, get confirmation on plunger story here.

M2: Taking awhile, isn't it?

MV: Meanwhile Mark's run down to the hall out of the maintenance closet, grabbed a couple of plungers and stuck them on his chest, and he thinks he's Madonna right now. So we'll keep you posted on that, too.

* * *

MV: Hi, 97 rock.

MC: Hi, this is Frank from True Value, I sold that guy the plunger, you know.

MV: (Laughs)

MC: Seriously, I heard him, they were talking in the store about it, so I figured I would, you know, pass it on to you guys.

MV: Was it a special plunger?

MV: ... Now, so Cindy said she heard it from Ann, we called Ann, and Ann said yes she confirmed she did tell her the story, but it wasn't her, it was somebody else. She heard the story from her husband, she called her husband, her husband wouldn't talk to us because if folks at work found out and it would be bad. So it's somebody at work, you may hear about this.

M2: The whole circle, the whole loop. You know hundreds of offices in Buffalo are now.

MV: Asking around, have you got a plunger in your house? Plunger in your house? Got a plunger? So that was fun. It's amazing stories this morning and thanks for calling. I don't know if we'll have any carry over tomorrow or not. I was hoping we could get confirmation here from this couple because they're stars now and they don't even know it.

M2: (Unintelligible)

MV: Plunger and

M2: Plunger, the adventures of plunger woman.

MV: Hey, voice box man and plunger woman together. Could be a natural there. Let's get to work on that....

* * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-65

In the Matter of

Amendment of Section 73.202(b), RM-8595
Table of Allotments,
FM Broadcast Stations.
(Billings, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 4, 1995; Released: May 12, 1995

Comment Date: July 3, 1995
Reply Comment Date: July 18, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Conway Broadcasting ("Conway") requesting the allotment of Channel 242C1 to Billings, Montana, as that community's ninth FM service. Conway submitted information in support of the allotment at Billings and stated its intention to file an application for Channel 242C1 if allotted to the community.

2. We believe Conway's proposal warrants consideration. Channel 242C1 can be allotted to Billings, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the fact that the proposed allotment would provide additional broadcast service to Billings, Montana, the Commission believes the public interest would be served by soliciting comments on Conway's proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below:

	Channel No.	
Community	Present	Proposed
Billings, Montana	227C1, 231C, 246C2, 253C1, 275C1, 279C1,	227C1, 231C, 242C1, 246C2, 253C1, 275C1, 279C1, 286A, 298C[2]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 3, 1995**, and reply comments on or before **July 18, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Conway Broadcasting
4415 Fremont Avenue, South
Minneapolis, Minnesota 55409

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 242C1 at Billings are 45-46-58 and 108-30-13.
[2] MM Docket 94-68, 9 FCC Rcd 3150 (1994), proposed the addition of Channel 286A to Billings. The *Notice* in RM-8547 proposes to add Channel 298C to Billings.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JMJ ASSOCIATES, INC.,
Complainant,

v. File No. E-94-47

NEW YORK TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: May 8, 1995; Released: May 12, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 28, 1994, JMJ Associates, Inc. ("JMJ") filed the above-captioned formal complaint against New York Telephone Comapny ("NYT"), alleging violations of Sections 201(b) and 202(a) of the Communications Act of 1934, 47 U.S.C. §§ 201(b) and 202(a), as amended. On May 5, 1995, the parties filed a Joint Motion to Dismiss the complaint with prejudice stating that they have reached a mutually agreeable settlement.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint in this case will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss is GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint is DISMISSED WITH PREJUDICE and that the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Services, Inc. CUID No. TX0284 (Seguin)

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Communications Services, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DYNAMIC CABLEVISION OF FLORIDA, LTD.
Hialeah, FL — LOI-93-43

Motion for Stay
Pending Reconsideration of
Order on Letter of Inquiry

ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 9, 1995, Dynamic Cablevision of Florida, Ltd. ("Dynamic"), filed a Motion for Stay pending reconsideration by the Cable Services Bureau of the *Memorandum Opinion and Order* issued in the Letter of Inquiry ("LOI") proceeding concerning Dynamic.[1] The *LOI Order* requires Dynamic to restructure its service offerings on or before March 22, 1995, to treat the channels composing its Cable Plus package and Expanded Package as rate-regulated channels. Dynamic filed a Petition for Reconsideration of the Order on January 23, 1995. In the instant Motion, Dynamic seeks a stay of the *LOI Order* pending the resolution of its Petition for Reconsideration. For the reasons set forth below, we grant Dynamic's Petition for Stay.

II. BACKGROUND

2. On September 28, 1993, the Commission received an FCC Form 329 Complaint filed by Metropolitan Dade County concerning the reasonableness of rates charged for cable programming services by Dynamic. In response to this complaint, the Commission issued a Letter of Inquiry to Dynamic on December 13, 1993.[2] The LOI asked Dynamic to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Dynamic responded to our LOI on January 12, 1994.

3. Based on the information submitted by Dynamic and the Commission's rules, the Bureau found that Dynamic's Cable Plus package and Expanded Package, as the offerings existed in Hialeah, Florida, on December 13, 1993, the date of the Commission's Letter of Inquiry, were not exempt from regulation.[3] As a result, the Bureau ordered Dynamic to either (1) offer the channels composing Dynamic's Cable Plus and Expanded packages as part of the respective rate-regulated tiers in which they were offered prior to September 1, 1993, or (2) offer the channels collectively as a separate rate-regulated tier of cable programming service. In addition, the Bureau ordered the channels to be counted by Dynamic as rate-regulated channels as of September 1, 1993, for purposes of rate justification.[4] Dynamic filed a Petition for Reconsideration of the *LOI Order* on January 23, 1995, and subsequently filed the instant Motion for Stay. No opposition to the Motion is on file.

III. DISCUSSION

4. The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[5] As described below, resolution of this particular stay rests mainly on the strength of Dynamic's argument concerning the second prong of this test.

5. Dynamic claims that it will suffer irreparable injury if it is required to comply with the Bureau's *LOI Order*, since it would be required to restructure and reprice its service packages, bearsubstantial marketing costs associated with the restructuring, and implement rate refunds pursuant to any rate orders which would be based on the *LOI Order*.[6] In the event Dynamic's Petition for Reconsideration is successful on the merits, Dynamic asserts that its financial losses would be unrecoverable.[7] Dynamic also claims it will suffer damage to its goodwill if a stay is not granted.[8]

6. We grant the stay requested by Dynamic pending resolution of its Petition for Reconsideration of the *LOI Order*. We conclude that a stay of our order is appropriate to prevent Dynamic from being subjected to the irreparable economic harm of implementing a restructuring, with its associated expenses, and issuing refunds to subscribers that it could not later recoup. In light of the potential irreparable harm which could result if Dynamic is required to restructure its service offerings before the Commission has decided the merits of Dynamic's Petition for Reconsideration, we find that a stay of our order best serves the public interest.

7. Accordingly, IT IS ORDERED that the *Memorandum Opinion and Order* issued in Letter of Inquiry proceeding No. LOI-93-43 is STAYED pending the resolution of Dynamic's Petition for Reconsideration. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

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[1] Dynamic Cablevision of Florida, Ltd., Memorandum Opinion and Order, LOI-93-43, DA 94-1546 (Cab. Serv. Bur., released Dec. 22, 1994) (*"LOI Order"*).

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Dynamic Cablevision of Florida, LOI-93-43 (December 13, 1993).

[3] *LOI Order* at ¶ 21.

[4] *Id.* at ¶ 21.

[5] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] *See* Motion at 8.,

[7] *Id.*

[8] *Id.* at 8-9.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NOVATO CABLE COMPANY d/o/a
CHAMBERS CABLE OF NOVATO

Appeal of Local Rate
Order of City of
Novato, California

ORDER

Adopted: March 27, 1995; Released: March 28, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 10, 1995, Novato Cable Company d/b/a Chambers Cable of Novato ("Chambers"), the franchisee in the above matter, filed an Appeal of Local Rate Order. The rate order was adopted on December 13, 1994 by Chambers' local franchising authority, the City of Novato, California ("the City").[1] The City opposes Chambers' appeal.[2] The Rate Order establishes a new regulated rate schedule for Chambers' basic service tier rates and associated equipment.[3]

2. In its rate order, the City requires Chambers to establish a new rate schedule for its basic service tier and associated equipment and installations and to issue refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through May 14, 1994. Specifically, the City disallowed all of Chambers' installation rates, effectively setting those rates at zero for the period under review. Chambers argues that because of this misapplication of the Commission's rate regulations, the City has improperly reduced Chambers' regulated revenues by setting its rates for installations below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules. The City counters that it set Chambers' installation rates as a punitive measure because Chambers was uncooperative during the City's rate regulation process. Chambers also contends that the City exceeded its authority by including language in its rate order that requires prior approval by the City before Chambers may increase any of its rates in the future. We address each issue in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

A. Installation Rates/Refunds

4. Under the 1992 Cable Act and the Commission's rules, cable operators are required to set their rates for regulated customer equipment and installations using a cost-based method. In effect, the cable operator must supply customer equipment, such as converters and remotes, and make installations at rates based on its own costs including a reasonable rate of return. In this case, Chambers contends that the City's setting of Chambers' installation rates at zero clearly violates the Commission's rate regulations because it has no basis under the Commission's rules. Chambers has decided to offer installations based on a rate determined by the hourly service charge, as it is entitled to by Form 393, rather than compute a flat rate for each type of installation. Because it has made this choice, Chambers contends that it does not have to provide the City with the information required under Part III, Schedule D, which, it argues, is only applicable to operators that choose to offer flat rates for installations.

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[1] With its appeal, Chambers also filed an Emergency Petition for Stay, requesting a stay of the local rate order, pending Commission review. Because we reach the merits of Chambers' appeal in this order, the stay petition will be dismissed as moot.

[2] The City filed its opposition on January 25, 1995, to which Chambers filed a reply on February 7, 1995, one day past the deadline under our rules for such a filing. 47 C.F.R. § 76.944(b) (1993). Though we may accept late-filed materials in appropriate circumstances, upon a showing of good cause, *see* Meredith/New Heritage Strategic Partners, L.P., 9 FCC Rcd 6841 (1994), we will not accept the pleading since Chambers has not shown "good cause" for the late filing of its reply. We note that nothing in Chambers' late-filed reply would change the determination made herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

[4] *See* 47 C.F.R. § 76.944 (1993).

[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) (*"Rate Order"*); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Id.*

[7] *Id.*

5. The City, on the other hand, argues that Chambers' conduct during the City's period of review of Chambers' proposed rates left the City with few options regarding Chambers' installation rates. After initially reviewing Chambers' Form 393 submitted to the City on May 11, 1994, and extending its evaluation period by an additional ninety (90) days on June 2, 1994, the City sent a data request on July 8, 1994. On August 4, 1995, Chambers responded to the data request by submitting a revised Form 393 and a letter of explanation. The City and Chambers also exchanged several letters and phone calls from the time Chambers submitted its first Form 393 until the City adopted its rate order on December 13, 1994. The City contends Chambers never provided the installation rates it charged during the time period under review, information required under Part III, Schedule D of Form 393. Without that information, the City continues, it was unable to calculate Chambers' refund lability and therefore, the City set the installation rates at zero, and ordered Chambers to refund all installation revenue from September 1, 1993 through May 14, 1994.

6. The City further contends, and Chambers does not dispute the contention, that Chambers had been charging its (pre-rate regulation) flat rates for installations, not an hourly service charge, until November 1, 1994. Even if Chambers does switch to an hourly service charge from a flat rate system, the City asserts that Chambers still must justify the rates it charged to subscribers for installations from September 1, 1993 to May 14, 1994 in order for the City to compute Chambers' refund liability. Without the data required in Part III, Schedule D of Form 393, which includes the flat installation rates that Chambers charges during the time period under review, the City asserts that it is unable to determine whether Chambers' installation rates were reasonable.

7. Generally, the Commission leaves regulation of basic tier service to the sound discretion of certified local franchising authorities. Although local franchising authorities have broad authority to encourage compliance with their requests for information, including setting rates, they must exercise that authority in accordance with the Commission's rules. In fact, under Commission rules, local franchising authorities ". . . have the authority to deem a non-responsive operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief. This relief could include, for example, ordering a prospective rate reduction and a refund. Such a refund would be based on the best information available."[8] For example, a franchising authority could set rates for a nonresponsive operator by using financial data from cable operators in neighboring communities, if available.[9] A franchising authority could also use industry financial data from the National Cable Television Association or another entity which makes such information available to set an uncooperative operator's rates based on industry averages. Moreover, if a franchising authority has the power under state or local law, it may impose forfeitures or fines for violations of its rules, orders, or decisions, including filing deadlines and orders to provide information.[10]

8. Setting Chambers' installations rates at zero, however, was not in accordance with our rules and was therefore unreasonable. Chambers' refusal to provide the City with its installation rates from the Form 393 refund liability period was also not in accordance with our rules and cannot be condoned. This issue is therefore remanded to the City with instructions that Chambers provide the City, within ten (10) days of the release of this order, with its installation rates during the Form 393 refund liability period (September 1, 1993 through May 14, 1994), so that the City may calculate Chambers' refund liability, if any.[11]

B. Prior Approval for Future Rate Increases

9. Chambers next contends that the City exceeded its authority by including language in its rate order that requires prior approval by the City before Chambers may increase any of its rates in the future, notwithstanding the fact that, under Commission rules, operators may increase certain pass-through rates without prior approval from the City.[12] In its opposition, the City states that it understands it may not preempt Commission rules. The City further states that it will insert language which acknowledges that certain rate increases do not need prior City approval. In express reliance on the City's representation on this point, the issue is dismissed as moot.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that Chambers' appeal of the City's local Rate Order, regarding installation rates and refund liability, IS REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

11. IT IS FURTHER ORDERED that Chambers MUST SUBMIT to the City a completed Part III, Schedule D of Form 393, containing Chambers' installation rates for the time period under review, within ten (10) days of the release of this order.

12. IT IS FURTHER ORDERED that Chambers' appeal of the City's local Rate Order, regarding prior approval of future rate increases, IS DISMISSED as moot.

13. IT IS FURTHER ORDERED that the Emergency Petition for Stay filed by Chambers Cable of Novato IS DISMISSED as moot.

14. This action is taken by the Chief, Cable Services Bureau,pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

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[8] *Third Recon. Order*, 9 FCC Rcd at 4347.

[9] Harron Communications Corporation (Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich, Massachusetts), DA 95-160 (Cable Services Bureau, released February 7, 1995) (*"Harron"*). In *Harron*, the franchising authority set an uncooperative operator's rates by using data from other communities the operator served (which the operator did provide to the franchising authority) as well as by using estimates based on the franchising authority's experience with other operator's within the state. We found that the franchising authority's action was reasonable.

[10] *Id.* at 4345; TCI Cablevision of St. Louis, Inc. (St. Louis, MO), 9 FCC Rcd 2141, 2142 (1994).

[11] *See* Century Southwest Cable Television Corporation (West Hollywood, California), 9 FCC Rcd 2583 (1994).

[12] For example, cable operators may revise their rates to reflect increases in local franchise fees and Commission regulatory fees without receiving franchising authority approval. 47 C.F.R. § 76.933(e).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER CABLE OF
NEW YORK CITY AND QUEENS
INNER UNITY CABLE SYSTEMS

Appeal of Local Rate Order
of the City of New York, NY
(Brooklyn, CUID No. NY1280)
(Queens, CUID No. NY1281)
(Queens, CUID No. NY1340)
(Queens, CUID No. NY1402)

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: March 29, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 30, 1994, Time Warner Cable of New York City and Queens Inner Unity Cable Systems (collectively, "Time Warner"), the franchisees in the above matter, filed an appeal of a local rate order adopted by the City of New York (the "City") on August 31, 1994. On October 17, 1994, the City filed an opposition to Time Warner's appeal urging the Commission to reject Time Warner's appeal and to allow the City's rate order to go into effect unchanged. Time Warner filed a reply on October 27, 1994. In its rate order, the City established rates for basic tier service and associated equipment and installations in four franchise areas and required Time Warner to refund overcharges to subscribers.[1]

2. Time Warner raises three issues in its appeal. First, Time Warner asserts that the City, in reviewing Time Warner's FCC Form 393 filing,[2] impermissibly and arbitrarily reduced its entry on Line 104 (*i.e.*, equipment and installation revenues) to match its entry on Line 301 (*i.e.*, equipment and installation costs) in Part II of its Form 393, resulting in a reduction of Time Warner's permitted rate for the basic service tier. Second, Time Warner claims that the City's rate order improperly sets Time Warner's rates for the basic service tier at a lower level than allowed by the Commission's rules because it incorporates a rounding error made by the City's consultant in preparing its report. Third, Time Warner argues that the per-channel rate adopted in the City's rate order is based on an incorrect number of basic service tier channels.

3. In response, the City asserts that it was reasonable in modifying Time Warner's entry for Line 104 because the Commission has stated that these numbers should be equal if an operator has restructured its equipment and installation rates to comply with the Commission's rules. The City also disputes Time Warner's allegations that the City's consultant committed a rounding error and that it used an incorrect number of basic service tier channels to compute permissible rates. Instead, the City asserts that the rates it set for Time Warner's regulated service comport with the Commission's rules and should not be adjusted. The City also argues that Time Warner should be barred from raising these claims at this juncture because it failed to raise these claims before the City's rate order was issued.

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6]

II. DISCUSSION

5. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[7] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming,

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[2] The Commission's Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") directs a cable operator to determine its maximum permitted rates for regulated service, equipment, and installations.

[3] 47 C.F.R. § 76.944.

[4] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[5] *Id.*

[6] *Id.*

[7] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Recon. Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[8] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

A. SUBSTITUTION OF LINE 301 FOR LINE 104

7. Time Warner contends that the City, in its review of Time Warner's rate filing, improperly substituted Time Warner's Line 301 entry for its Line 104 entry in Part II of its FCC Form 393, resulting in an inappropriate reduction of its permitted rate for the basic service tier. Time Warner argues that entries for Lines 104 and 301 will, almost by definition, differ slightly because Line 301 requires a "historical" figure while Line 104 requires a "representative" monthly figure. Time Warner claims that an operator's entry for Line 301 should represent a monthly average of past equipment costs while its entry for Line 104 "will fluctuate depending on which month is chosen as representative.'" In response, the City argues that the Commission has previously stated in a *Public Notice* that an operator's entries for Lines 104 and 301 should be the same.[9] Because it found that Time Warner's entry for Line 104 was seven percent greater than its entry for Line 301, the City concluded that the entries were substantially different and that, as a result, it was justified in making the substitution in accordance with the Commission's guidelines.

8. We affirm the City's decision. In the above-mentioned *Public Notice*,[10] we discussed the issue of the relationship between Lines 104 and 301 on FCC Form 393.

> The instructions for completing Worksheet I Line 104 of FCC Form 393 specify that equipment revenues for the year preceding that date shall be used in computations of the current rate per channel which is to be compared to the benchmark. Revenues for the previous years may not be sufficiently representative where the operator has already unbundled and instituted cost-based pricing in accordance with our requirements. This answer clarifies that in completing Line 104 operators must use equipment revenues that will be representative of the equipment rates that were in effect as of the initial date of regulation. Where available, actual revenues should be used. Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations, we would anticipate that in most cases, absent special circumstances, operators will enter on Line 104 the same, or nearly the same, number as on Line 301. Line 301 is the anticipated revenues based on equipment rates derived in accordance with FCC rate regulations.[11]

It appears that Time Warner restructured its rates prior to the date it filed its initial Form 393 with the City. Consequently, absent special circumstances, it was reasonable for the City to presume that Time Warner's entries for Lines 104 and 301 on its Form 393 should be the same. Time Warner has not alleged any such special circumstances. Therefore, the City was reasonable in substituting Time Warner's entry for Line 301 onto Line 104.

9. In fact, the potential consequences that could stem from Time Warner's interpretation of the term "representative" month lend further support to this conclusion. It was not our intent to allow operators to pick and choose any month as a "representative" month to alter the impact on its permitted rate level. If an operator has restructured its rates in compliance with the Commission's rate regulations, the most appropriate figure to determine an operator's average month's equipment revenue generally would appear to be its equipment cost figure in Line 301.

B. ROUNDING ERROR

10. Time Warner also alleges that, based on its review of a chart in the report prepared by the City's consultant, the City's consultant made a crucial rounding error when the consultant revised Time Warner's Form 393. Specifically, Time Warner claims that the City simply reduced the permitted per-channel rate calculated by Time Warner by $.003 to account for the adjustment the City made to Line 104, resulting in a new permitted per-channel rate of $.296. Time Warner claims that the City subtracted the $.003 figure from an incorrectly rounded per-channel rate of $.299. Time Warner asserts that the base rate it calculated was actually $.2999, which the City should have rounded up to $.300.[12] Consequently, Time Warner argues that even

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[8] An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[9] The City cites as support for this proposition , *FCC Public Notice*, "Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements," Question and Answer No. 7 (released November 10, 1993).

[10] *Id.*

[11] *Id.*

[12] Time Warner claims that this rounding error stems from difficulties that it encountered in deriving its permitted rates using the spreadsheet version of Form 393. Time Warner asserts

if it loses its appeal with regard to the substitution of Line 104, the permitted per-channel rate derived by the City should be adjusted to $.297 ($.300 - $.003).

11. In response, the City states that Time Warner mischaracterizes the methodology used by the City to calculate Time Warner's permitted rates. The City asserts that it did not simply reduce the rate calculated by Time Warner by $.003 to derive the permitted per-channel rate. According to the City, it calculated a new per-channel rate by incorporating its changes to Time Warner's data in an amended Form 393. The City claims that, although the $.003 figure cited by Time Warner appears in a chart prepared by its consultant, that chart was simply an attempt to illustrate the numerical difference between the per-channel rate calculated by Time Warner and the per-channel rate calculated by the City's consultant, which was the rate ultimately adopted by the City. In its reply, Time Warner claims that it was not provided a copy of the City's recalculated Form 393 before the City issued its rate order, and, as a result, it was improperly denied an opportunity to analyze and comment on the City's methodology.

12. We reject Time Warner's arguments. We believe Time Warner's rounding argument misses the point. Time Warner attempts to use a consultant's chart, which was prepared for illustrative purposes only and had nothing to do with the actual calculation of the rate, to argue that the City's rate determination was unreasonable. The City has explained that the rate that it adopted as Time Warner's permitted per-channel rate was not derived by subtracting $.003 from the per-channel rate calculated by Time Warner. Instead, the City calculated the permitted per-channel rate by substituting its changes onto Time Warner's Form 393 and recalculating the Form based on these modifications.

13. Although the City is required to provide an explanation of its calculations in its rate order, it is not required to provide Time Warner with a copy of a recalculated Form 393.[13] In this instance, the City provided Time Warner with a written decision as well as copies of many of the documents it relied upon in issuing its decision, including its consultant's report. It appears from the submissions that the City has made extensive efforts to inform Time Warner of the reasons for its actions. To confirm the City's results, Time Warner itself could have recalculated its own Form 393 based on the modifications that the City had announced that it had made. Significantly, Time Warner does not argue that, when the City's modifications are used to recalculate Time Warner's Form 393, the resulting permitted rate should be different than that rate derived by the City. Based on all of this, we conclude that Time Warner had enough information to understand the logic and to recognize the factual bases of the City's decision.

C. CHANNEL COUNT

14. Time Warner also alleges that the City incorrectly calculated its permitted basic service tier rate based on 35 channels rather than 35.3 channels.[14] Time Warner justifies its use of fractional channels by claiming that it submitted its rate filing on a system-wide basis, comprising four separate franchise areas, rather than by each individual franchise area. In three of the four franchise areas it had 35 channels, and in the remaining franchise area it had 36 channels. Time Warner claims that it entered 35.3 channels on Line 101 of Part II of the Form 393 spreadsheet to represent the average number of channels in each franchise area affected by the rate filing. However, the print-out version of Time Warner's Form 393 computer spreadsheet only displayed 35 channels on Line 101 of Part II.[15] Even though 35.3 channels was not actually displayed in Line 101 of the print-out version of its Form 393, Time Warner suggests that its use of 35.3 channels, rather than 35 channels, in the computer spreadsheet version of the Form should have been evident to the City when the City conducted its review of Time Warner's filing. In response, the City argues that it reasonably relied on Time Warner's revised Form 393 that listed 35 channels on Line 101 of Part II. Furthermore, the City claims that Time Warner never suggested that the proper figure should be 35.3 channels.

15. It is clear that Time Warner made a single system-wide filing covering these four franchise areas. System-wide filings may only be made when, *inter alia*, channel line-ups are the same for each franchise area covered by the filing.[16] Time Warner is not permitted to submit a single rate filing using system-wide data for four franchise areas where one of the four franchise areas has a different channel line-up.[17] As a result, Time Warner may not use fractional channels to account for services that vary by franchise area. Time Warner must submit a separate filing for the franchise area with a different channel line-up. Consequently, we remand this issue to the City for resolution in accordance with the terms of this Order.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the appeal filed by Time Warner Cable of New York and Queens Inner Unity Cable Systems with respect to the reasonableness of the City of New York's substitution of Time Warner's entry on Line 301 for its entry on Line 104 on its Form 393 IS DENIED.

17. IT IS FURTHER ORDERED that Time Warner's and Queen Inner Unity's appeal regarding the effect of a purported rounding error on its permitted rate for the basic service tier IS DENIED.

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that although the printed version of its Form 393 displayed $.299 in Line 600 of Part II of its Form 393, the correct figure should have been $.300.

[13] *See* 47 C.F.R. § 76.936; *Rate Order* at 5715.

[14] To derive a fractional figure that represented the number of system subscribers receiving the additional channel, Time Warner used a weighted average based on the total number of subscribers receiving the additional channel (*i.e.*, the total number of subscribers in the franchise area served by 36 channels) in relation to its overall subscribership for the entire system comprising each of the four franchise areas.

[15] Time Warner claims that this discrepancy was due to the fact that the spreadsheet program was set up so that the form displays only whole, not fractional, channels.

[16] FCC Form 393, p.10, n.1; *See, e.g., Time Warner Cable of New York, Inc. and Queens Inner Unity Cable Systems, Inc.*, DA 95-429 (Cable Programming Service Rate Complaint) (Cab. Serv. Bur., released Mar. 7, 1995); *See also, Public Notice*, "Cable Television Rate Regulation: Questions and Answers Relating to FCC Form 393," Question and Answer No. 3 (released July 30, 1993).

[17] *See Id.*

18. IT IS FURTHER ORDERED that Time Warner's and Queen Inner Unity's appeal regarding the appropriate number of basic service tier channels relied on by the City in issuing its rate order IS REMANDED to the City for proceedings consistent with the terms of this Order.

19. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

STAUFFER COMMUNICATIONS, INC.
(Transferor)

and File Nos. BTCCT-940915KH-KP
BTCTTV-940915KS
BTCTT-940915KT-KV

MORRIS COMMUNICATIONS
CORPORATION
(Transferee)

For Consent to the Transfer of Control
of Licenses of Stations:
KCOY-TV, Santa Maria, California
KMIZ(TV), Columbia, Missouri
WIBW-TV, Topeka, Kansas
KGWN-TV, Cheyenne, Wyoming
KSTF(TV), Scottsbluff, Nebraska
KTVS(TV), Sterling, Colorado
KGWC-TV, Casper, Wyoming
KGWR-TV, Rock Springs, Wyoming
KGWL-TV, Lander, Wyoming
KO8IQ, Laramie, WY
K68DC, Clareton, WY
K16AE, Gillette, WY
K44DN, Paso Robles, CA

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1995; Released: May 8, 1995

By the Commission:

1. The Commission has before it for consideration the unopposed applications for consent to the transfer of control of Stauffer Communications, Inc. (Stauffer), licensee of the above-captioned stations, to Morris Communications Corpo ration (Morris). Stauffer is also the owner of The Topeka Capital-Journal, a daily newspaper published in Topeka, Kansas, which is being acquired by Morris.

2. Stauffer has owned and operated television station WIBW-TV and The Topeka Capital-Journal for twenty years, pursuant to its grandfathered status under our multiple ownership rules. However, the proposed transfer to Morris would violate the Commission's television-newspaper cross-ownership rule. Accordingly, Morris has requested a temporary waiver of Section 73.3555(d)(3) of our Rules during which it will arrange to sell station WIBW-TV. We also consider here the proposal of Morris to continue operating stations KSTF(TV) and KTVS(TV) as satellites of KGWN(TV), and KGWR(TV) and KGWL(TV) as satellites of KGWC-TV.

TEMPORARY WAIVER OF THE TELEVISION-NEWSPAPER CROSS-OWNERSHIP RULE

3. Within the market of Topeka, Kansas, Stauffer has owned and operated WIBW-TV and The Topeka Capital-Journal daily newspaper for twenty years, pursuant to its grandfathered status under our multiple ownership rules. However, grandfathered status under our multiple ownership rules terminates upon Commission approval of a transfer of control. *See* 47 C.F.R. §73.3555, Note 4. Consequently, the proposed transfer of control to Morris will violate the Commission's television-newspaper cross-ownership rule, which prohibits common ownership of a daily newspaper and a television broadcast station license in the same market. *See* 47 C.F.R. §73.3555(d)(3).

4. In order to come into compliance with Section 73.3555(d)(3) of the Commission's rules, Morris has requested an eighteen-month waiver of that rule. Within that waiver period, Morris proposes to dispose of television station WIBW-TV. In support of its request, Morris asserts that eighteen months is necessary because an immediate sale would "unnecessarily restrict" the value of the station and "artificially limit" the range of potential buyers. Morris points to minority-controlled and local groups as entities who could be precluded by an immediate sale of WIBW-TV, noting that such entities often do not have immediate access to the capital required for acquisition of a station. According to Morris, in the past the Commission has allowed such considerations as justification for temporary waiver of the multiple ownership rules. *See e.g., Citadel Communications Company, Ltd.*, 5 FCC Rcd 3842, 3844 (1990).

5. Morris also claims that grant of the requested waivers would not violate the Commission's objectives of economic competition and diversity of programming and viewpoints. It indicates that the Topeka market is served by fourteen radio stations, four television stations, one low power television station and an abundance of cable television systems. Thus, Morris maintains that the community of Topeka, Kansas would continue to be served by a number of media voices if its waiver request was granted.

6. Morris further notes that a grant of the waiver request would not create any new media combinations but would merely continue the existing common ownership of WIBW-TV and The Topeka Capital-Journal for a short period pending divestiture of the acquired television station. Moreover, unlike the television-newspaper combined operation under Stauffer's ownership, Morris states that following the transfer of control, WIBW-TV will be operated with a staff separate from the staff involved in the daily operation of The Topeka Capital-Journal. Morris contends such daily operation by independent staffs actually promotes the Commission's goal of diversity.

7. Based on the representations provided above, we believe that a temporary waiver of Section 73.3555(d)(3) is consistent with Commission precedent and will serve the public interest. *See e.g., Metromedia Radio and Television, Inc.*, 102 FCC2d 1334 (1985), *recon. denied*, 59 RR2d 1211 (1986). As we have stated in the past, the primary goals of our multiple ownership rules are to promote diversity of ownership and viewpoint, as well as to prevent any undue concentration of economic power contrary to the public interest. We find that a temporary waiver of our multiple ownership rules will not appreciably affect the principles of diversity or competition in the circumstances present in this case. First, the market of Topeka hosts a multiplicity of alternative media services. In addition, the instant televi-

sion-newspaper combination has existed for several years without undue adverse effects on the public interest. We believe the proposed temporary continuation of that multiple ownership combination would not create any significant additional burden adverse to our interests in diversity and competition. Further, this transaction would eventually allow a grandfathered newspaper-television cross-ownership in Topeka to be broken up as a result of the grant of these applications. Therefore, competition among the mass media will ultimately increase. Further, we believe that requiring an immediate sale of the televisi on station could artificially limit the range of potential buyers to those with immediate access to the necessary capital, and could work an economic hardship on Morris without offsetting public interest benefits. *See Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760, 4761 (1989). An eighteen-month waiver period, on the other hand, would avoid such hardship and would provide the opportunity for a broader range of potential buyers, thus serving our policies of diversity and economic competition. Accordingly, we will grant the requested temporary waiver.

SATELLITE PROPOSALS

8. Pursuant to the satellite exception to the multiple ownership rule set forth in Note 5 to Section 73.3555 of the Commission's Rules, television stations KSTF(TV), Scottsbluff, Nebraska and KTVS(TV), Sterling, Colorado, operate as satellites of KGWN-TV, Cheyenne, Wyoming. Television stations KGWR-TV, Rock Springs, Wyoming and KGWL-TV, Lander, Wyoming operate as satellites of KGWC-TV, Casper, Wyoming. Morris seeks to acquire these six television stations and to maintain the satellite status of KSTF(TV), KTVS(TV), KGWR-TV and KGWL-TV. In support of its request, Morris contends that the continued operation of the stations as satellites meets the three criteria established by the Commission in *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending).[1] The Commission requires all applicants seeking to transfer existing satellite stations and to continue these stations' satellite status to demonstrate that the stations meet our satellite policy at the time of transfer. *Id.* at 4215.

9. Pursuant to the Commission's satellite policy, an applicant is entitled to a presumption that its proposed satellite operation is in the public interest if it meets three criteria: (1) no City Grade contour overlap exists between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able either to construct or to purchase and operate the satellite as a full-service station. *Id.* at 4212. If an applicant cannot qualify for the presumption, we will evaluate the proposal on an ad hoc basis to determine whether other compelling circumstances warrant grant of the application. *Id.* at 4214.

10. With regard to the first criterion of the presumption, Morris has submitted an engineering study which demonstrates that the City Grade contours of KGWN-TV and its two satellites, KSTF(TV) and KTVS(TV), do not overlap. Moreover, the engineering study demonstrates that there is no City Grade contour overlap between KGWC-TV and its two satellites, KGWR-TV and KGWL-TV. Thus, both proposed satellite operations meet the first component of the presumption.

11. With respect to the second criterion, Morris has demonstrated that the area where each satellite station is located is underserved by using one of our two tests. The first is a "transmission test," which defines as "underserved" an area with two or fewer full-service stations already licensed to the community.[2] Morris has certified that KTVS(TV) is the only full-service station licensed to Sterling, Colorado; and KSTF(TV) is one of only two full-service stations licensed to Scottsbluff, Nebraska. Further, Morris has shown that KGWR-TV is the only full-service station licensed to Rock Springs, Wyoming; and KGWL-TV is one of only two television stations licensed to Lander, Wyoming. Accordingly, these stations also meet the second criterion for the satellite presumption.

12. As to the third criterion to qualify for the presumption, an applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service stand-alone station. In this regard, Morris has submitted a declaration from Gerald N. Holley, Vice President-Broadcasting of Stauffer, which states that, in its eight years of ownership, Stauffer has received no solicitations to purchase and operate any of the four satellite stations as a stand-alone television facility. Morris has also submitted two statements by Brian E. Cobb, a media broker and a founding partner of Media Venture Partners, a media brokerage firm, asserting that neither the Cheyenne-Scottsbluff-Sterling market nor the Casper-Riverton-Lander-Rock Springs market would be able to sustain a full-service stand-alone station. Mr. Cobb states that if approached, he would refuse to list the four satellite stations for sale because he considers such efforts to be futile. Moreover, he contends that any competent media brokerage firm would view such a project as a "misuse" of time, given the sparsity of available revenue in each market. Further, the media broker points out that each of the four satellite stations serves only a small community. Therefore, Mr. Cobb does not believe they would be able to obtain a *bona fide* national sales representation firm willing to represent them in an effort to gain additional revenues. He asserts that, to be competitive in a market covering such a large geographic area, a station must serve the largest community. With regard to KGWL (Lander, Wyoming) and KGWR (Rock Springs, Wyoming), the applicants' engineering review concludes that neither of these stations, even if operating with maximum facilities, would be able to cover Casper, the main population center in the market. Likewise, with regard to KSTF (Scottsbluff, Nebraska) and KTVS (Sterling, Colorado), neither of these

[1] We note that there is an outstanding proceeding that invites comment on whether television satellite stations should continue to be exempted from the national multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the applications now before us would not implicate the 12-station rule. *See also Further Notice of Proposed Rulemaking in MM Docket Nos. 91-221 and 87-8*, FCC 94-322, released January 17, 1995.

[2] We have also defined an "underserved area" in terms of a "reception test," but that test is not material here. *See Television Satellite Stations*, 6 FCC Rcd at 4215.

stations, even if operating with maximum facilities, would be able to cover Cheyenne, the main population center in its market.[3] Thus, Mr. Cobb maintains that each station's inability to serve the largest community in the market would render the stations non-competitive, force them to go dark, and leave their own small communities unserved.

13. Based upon the above, we believe that the applicants have adequately demonstrated the unlikelihood of finding an alternative operator willing and able to operate the four satellite stations as full-service stand-alone facilities. *See P.P.D. & G., Inc.*, 8 FCC Rcd 8229 (1993). Thus, we conclude that the applicants have satisfied the third criterion and that allowing continued operation of KGWL-TV and KGWR-TV as satellites of KGWC-TV, and KSTF(TV) and KTVS(TV) as satellites of KGWN-TV would, therefore, be in the public interest.

CONCLUSION

14. Having determined that the applicants are qualified in all respects, we find that grant of the transfer of control of the licenses held by Stauffer to Morris will serve the public interest, convenience and necessity.

15. Accordingly, IT IS ORDERED, that the above-captioned applications for transfer of control of Stauffer Communications, Inc. to Morris Communications Corporation ARE GRANTED.

16. IT IS FURTHER ORDERED, that the requests for operation of stations KSTF(TV), Scottsbluff, Nebraska, KTVS(TV), Sterling, Colorado, KGWR-TV, Rock Springs, Wyoming and KGWL-TV Lander, Wyoming, pursuant to the satellite exception to Section 73.3555 of the Commission's Rules, IS GRANTED.

17. IT IS FURTHER ORDERED, that the request for temporary waiver of Section 73.3555(d)(3) of the Commission's Rules IS GRANTED, subject to the condition that Morris divest itself of its interest in WIBW-TV no later than eighteen months from the consummation of this transaction.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Pursuant to Section 73.614(b)(5), a maximum facility would have an effective radiated power of 5,000 kilowatts with a height above average terrain (HAAT) of 610 meters. This would provide Grade B coverage to an approximate distance of 65 miles. As calculated in the engineering statement submitted with the application, the distance from Casper to Lander is 122.9 miles and the distance from Casper to Rock Springs is 172.9 miles. With regard to KSTF(TV) and KTVS(TV), as calculated in the engineering statement, the distance from Cheyenne to Scottsbluff is 78.3 miles and the distance from Cheyenne to Sterling is 90.9 miles.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 10, 1995

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Alpine Electronics of America, Inc. - Request for refund of fees filed in connection with two applications for equipment authorization - **Granted** (April 7, 1995).

CTA Commercial Systems - Request for refund of filing fees submitted in connection with an application for construction, launch and operation of a satellite system in the Non-Voice, Non-Geostationary Mobile Satellite Service - **Denied** (April 4, 1995).

Curators of the University of Missouri - Petition for declaratory ruling for exemption from payment of application fees for stations at Columbia and Rolla, Missouri - **Granted** (April 3, 1995).

Jarvis, Russell P. - Request for refund of filing fees submitted in connection with an application for a construction permit for a new FM station at Point Arena, California - **Granted** (April 7, 1995).

JVC Information Products - Request for refund of filing fees submitted in connection with an application for equipment authorization - **Denied** (April 7, 1995).

Reier, Jr., William - Request for reinstatement of an application for a new FM station at Bozeman, Montana - **Denied** (April 3, 1995).

Schooner Yacht Wendameen - Request for waiver of ship inspection filing fees for the Schooner Yacht Wendameen - **Granted** (April 4, 1995).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202) 418-1995.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 7 1995

Mr. Dean Kanemitsu
Alpine Electronics of America, Inc.
P.O. Box 2859
Torrance, California 90509

Dear Mr. Kanemitsu:

This will respond to your request for refund of the filing fees submitted on behalf of Alpine Electronics of America, Inc. ("Alpine") in connection with its two applications for equipment authorization. You state, and your documentation shows, that Alpine's applications were dismissed because it had specified the same FCC Identifiers that the Commission had previously issued to Alpine with reference to other equipment in 1987. You further state that you have refiled Alpine's applications, with new FCC Identifiers, and additional fee payments.

As part of the Commission's equipment authorization process, approved equipment must be identified with a unique FCC Identifier, which consists of the grantee code and the equipment number/product code. See 47 C.F.R. sections 2.925, 2.926. This identification requirement provides a systematic method by which Commission approved equipment can readily be identified. Applications for equipment authorizations often are dismissed, without any engineering review, due to a defective FCC Identifier. The Commission has recognized that it may be unfair to require the applicant/grantee to refile its application with an additional fee payment merely to correct such errors or deficiencies. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 964 (1987). In such cases, the Commission has indicated that under section 1.1108(d) of the Commission's rules, 47 C.F.R. section 1.1108(d), it may be appropriate for the applicant/grantee to refile its corrected application without paying an additional fee. Id. However, since Alpine did pay additional fees with its resubmissions, we believe a refund is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $1,690.00, will be sent to you at the earliest practicable time. If you have any further questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Charles Cobbs, FCC Lab

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR

Ms. Jill Abeshouse Stern, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037-1128

Dear Ms. Stern:

This will respond to your request for a refund of the filing fees submitted by CTA Commercial Systems ("CTA") in connection with its applications for construction, launch and operation of a satellite system in the Non-Voice, Non-Geostationary Mobile Satellite Service ("NVNG MSS").

You state that at the time CTA had filed NVNG MSS applications, it was unclear whether the Commission would grant the petition of Eyetel International, Ltd. ("Eyetel"), which requested suspension of the obligation to concurrently file launch and operation applications and associated filing fees for this new generation of service. See Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service, 8 FCC Rcd 8450, 8455 (1993). You also state that given the number of NVNG MSS applications received, the Commission ultimately may institute competitive bidding, which would constitute a change in policy warranting refund of filing fees under section 1.1112(a)(4) of the Commission's rules, 47 C.F.R. Section 1.1112(a)(4). Thus, you represent that CTA is filing this request "to preserve its right to a refund of the fees" if the Commission should grant the Eyetel petition or change its licensing selection procedures.

The Commission recently denied the Eyetel petition. See Order DA 94-1261, 1994 WL 637780 (November 15, 1994). The Commission found Eyetel's petition untimely. The Commission further found that under section 25.113(d) of the rules, 47 C.F.R. Section 25.113(d), the Commission is not prohibited from requiring that requests for construction and launch authorizations be filed concurrently, together with the applicable fees as established by Congress. Moreover, the Commission has not instituted any changes in the licensing selection procedure that would warrant refund of CTA's filing fees under section 1.1112(a)(4). If future Commission actions significantly change the licensing processing requirements for the NVNG MSS service so that refunds would become appropriate under section 1.1112(a)(4), CTA may apply for refund at that time.

Thus, given that the Commission has denied Eyetel's petition, and has not instituted any rule or policy changes that significantly affects the NVNG MSS service, refund of CTA's fee payments is not warranted. Accordingly, your request is denied. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 3 1995

Kathryn R. Schmeltzer, Esq.
Robert L. Galbreath, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006

Dear Ms. Schmeltzer and Mr. Galbreath:

This is in response to the Petition for Declaratory Ruling that you recently filed on behalf of the Curators of the University of Missouri ("University"). The University is the licensee of commercial television station KOMU-TV, Columbia, Missouri, a low power television station and various other broadcast auxiliary facilities that rebroadcast the programming of KOMU-TV. The petition requests a determination that the University, as a political government entity, is exempt from submitting application fees.

Government entities are exempt from the payment of application fees. See 47 U.S.C. Section 158(h); see also 47 C.F.R. section 1.1113(f). The Commission had previously determined the University's status as a government entity, and thus exempted the University from the payment of any regulatory fees under 47 U.S.C. section 159(h). See Letter to Kathryn R. Schmeltzer from Marilyn J. McDermett, January 20, 1995. For the same reasons, the University will also be considered exempt from the obligation to pay any application fees.

Accordingly, your request is granted. If you have any further questions, please call the Chief, Fee Section at (202)418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 7 1995

Peter A. Casciato, Esq.
8 California Street
Suite 701
San Francisco, California 94111

Re: Fee Control # 9403018195656003

Dear Mr. Casciato:

This responds to your request for refund of a filing fee submitted on behalf of Russell P. Jarvis, in connection with his construction permit application for a new FM station at Point Arena, California.

You state, and your documentation shows, that Mr. Jarvis filed his application on February 28, 1994, three days after the Commission issued the Public Notice, "FCC Freezes Comparative Proceedings" ("Freeze Public Notice"), 9 FCC Rcd 1055 (1994). The Commission's Freeze Public Notice stayed comparative broadcast proceedings following the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which invalidated the Commission's integration policy. The Freeze Public Notice established that during the stay, cut-off lists and window filings for new FM filings would not be issued. You further state that Mr. Jarvis' application was mistakenly dismissed for lack of an original signature.

Under the circumstances, since Mr. Jarvis' filing fee was submitted after the release of the Freeze Public Notice, and thus outside any applicable FM window, refund of the filing fee is appropriate. See 47 C.F.R. Section 1.1112(a)(6). Having determined that a refund is appropriate, we need not address the issue involving Mr. Jarvis' original signature.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $2,030.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 7 1995

Ms. Susie Stackpoole
Product Safety Engineering, Inc.
Darby Open Area Test Site
12955 Bellamy Brothers Blvd.
Dade City, Florida 33525

Dear Ms. Stackpoole:

This will respond to your request for refund of the filing fee submitted on behalf of JVC Information Products ("JVC") in connection with its application for equipment authorization. You state, and your documentation shows, that the JVC's application was dismissed because it mistakenly had specified a grantee code that had been assigned to another company. You further state that JVC will have to refile its application , and specify a new grantee code or a new grantee name.

As part of the Commission's equipment authorization process, approved equipment must be identified with a unique FCC Identifier, which consists of the grantee's permanent code and the particular equipment's number/product code. See 47 C.F.R. sections 2.925, 2.926. This identification requirement provides a systematic method by which Commission approved equipment can readily be identified. Applications for equipment authorizations often are dismissed, without any engineering review, for reasons of a defective FCC Identifier. The Commission has recognized that it may be unfair to require the applicant/grantee to refile its application with an additional fee payment merely to correct such errors or deficiencies. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Act of 1985, 2 FCC Rcd 947, 964 (1987). In such cases, the Commission has indicated that it may be appropriate to apply section 1.1108(d) of the Commission's rules, 47 C.F.R. section 1.1108(d), which permits the staff to return the application without requiring an additional fee upon resubmission. Section 1.1108(d) requires the applicant to resubmit the corrected application either to the processing Bureau or the lockbox bank, as appropriate, and states that applicant will forfeit the original fee payment if the applicant fails to resubmit a corrected application.

Based on the foregoing, it would appear that since JVC had already paid its $845.00 certification fee, it should resubmit the corrected application with an additional $45.00 fee for its requested grantee code, and submit the relevant documentation, as specified in section 1.1108(d), to the lockbox bank. In the event that JVC fails to resubmit its application, its original fee will be forfeited.

Accordingly, your request for a filing fee refund is denied. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Charles Cobbs, FCC Lab

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 7 1995

Mr. William R. Reier, Jr.
3610 Broadwater Street, No. 101
Bozeman, Montana 59715

Dear Mr. Reier:

This will respond to your request for reinstatement of your application for a new FM station at Bozeman, Montana. You represent that the dismissal of your application was attributed solely to the fact that your bank erred in dishonoring your fee payment.

The Commission will reinstate an application that had been dismissed due to a failed fee payment only if the applicant submits a substitute payment and makes a convincing showing that the applicant's bank erred in failing to honor the fee payment. A convincing showing must include an affidavit (or sworn statement) from an officer of the bank that the failure to honor the check was due to bank error. See 47 C.F.R. §1.1115(a)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985, 5 FCC Rcd 3558, 3571 (1990).

It does not appear, however, that you have presented a convincing showing to warrant reinstatement of your application. The bank letter that you have submitted merely states that the bank inadvertently mailed two overdraft notices to the wrong address. The bank letter did not indicate that the bank had erroneously determined that there were insufficient funds in your account or that it specifically failed to honor, or abide by, its overdraft policy. Rather, the letter merely reflects that on at least two occasions your account was overdrawn and that the bank mailed notice of those occurrences to the wrong address. Further, the bank letter was not accompanied by an affidavit or sworn statement by an officer of the bank.

Based on the present state of the record, your request for reinstatement of the original application will be denied. Accordingly, we will refund the substitute payment that you furnished with your request for reinstatement. A check, made payable to you and drawn in the amount of $2,335.00, will be sent to you at the earliest practicable time. If you have any questions concerning this matter, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

APR 4 1995

Mr. Neal Parker
Schooner Yacht Wendameen
P.O. Box 506
Camden, Maine 04843

Dear Mr. Parker:

This will respond to your request for waiver of the ship inspection and related filing fees in connection with your operation of the Schooner Yacht Wendameen ("Wendameen"). You claim that payment of the fees will cause you financial hardship. In support of your claim, you have submitted a balance sheet that indicates that the Wendameen has been operating at a loss for the last four years. In addition, you state that the Wendameen is an historic property that has been listed on the National Register of Historic Places and that is "solely supported through [your] efforts."

The Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby. See 47 U.S.C. Section 158(d)(2); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 961 (1987). The Commission recently has noted that section 158(d)(2) fee waivers have been permitted "only on a case-by-case basis following a demonstration that the public interest clearly overrides the private interest of the requester." See Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 9 FCC Rcd 5333, 5344 (1994). We have determined that you have demonstrated good cause for waiver of the ship inspection and the related filing fees, and that the public interest in the preservation of a nationally recognized historic property outweighs any costs the Commission may incur.

We also find that your waiver request is distinguishable from that submitted on behalf of the Sea Scout Program, which operates a vessel for training purposes for the benefit of the Boy Scouts. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5926 (1991). The Sea Scout Program's waiver request was based primarily on the Boy Scout's not-for-profit status. The Commission denied the Sea Program's waiver, finding that not-for-profit organizations are not exempt generally from filing fees. The Commission further found that grant of the Sea Program waiver would compromise the Commission's waiver policy by encouraging a multitude of requests on behalf of organizations that perform "laudable" functions. Id. In contrast, your waiver is based upon financial hardship and the fact that the Wendameen is a unique historic property, which should be preserved, and as such, grant of your waiver will not encourage a multitude of waiver requests, or otherwise compromise our waiver policy.

Accordingly, your request for a waiver of the ship inspection and related filing fees will be granted. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-42

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 92-266
Cable Television Consumer Protection	)	
and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	

EIGHTH ORDER ON RECONSIDERATION

Adopted: February 3, 1995; Released: February 6, 1995

By the Commission:

I. INTRODUCTION

1. In this *Eighth Order on Reconsideration* we amend our rules to permit certified local franchising authorities, independent small systems, and small systems owned by small multiple system operators ("MSOs") to enter into alternative rate regulation agreements that comply with the Communications Act of 1934, as amended.[1]

II. BACKGROUND

2. Pursuant to the 1992 Cable Act, the Commission has established a comprehensive regulatory framework governing rates for regulated cable services and equipment.[2] Subject to certain limited exceptions, all regulated cable systems generally must

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[1] Communications Act of 1934, as amended, 47 U.S.C. § 521 et seq. (Communications Act"). The Cable Television Consumer Protection and Competition Act of 1992 amends Title 6 of the Communications Act. Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 534 (1992) ("the 1992 Cable Act" or "the Cable Act of 1992").

[2] *See Report and Order and Further Notice of Proposed Rulemaking, ("Rate Order")*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993); *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-389, 8 FCC Rcd 5585 (1993); *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 (1993); *Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, ("Second Reconsideration Order")*, MM Docket No. 92-266, FCC 94-

set rates based on a 17% competitive rate reduction from September 30, 1992 levels unless the system justifies rates based on a cost-of-service showing.[3] The 1992 Cable Act requires the Commission to reduce regulatory burdens and the cost of compliance for small systems.[4] Small systems are defined in the statute as systems serving 1,000 or fewer subscribers.[5] Pursuant to that mandate, the Commission has created different regulatory approaches that are available to small systems.

3. For example, an operator that owns more than one small system may establish its unbundled charges for regulated equipment based on the average equipment costs of all its small systems, or only some of them, rather than on a system-by-system basis.[6] Under our interim cost-of-service rules, independent small systems and small systems owned by small MSOs[7] may use simplified forms for purposes of making cost-of-service showings.[8] Small operators, defined as operators serving 15,000 or fewer subscribers and not affiliated with a larger operator, are eligible for transition relief.[9] Instead of setting rates based on a 17% competitive reduction, small operators may maintain their March 31, 1994 rates, with certain

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38, 9 FCC Rcd 4119 (1994); *Third Order on Reconsideration, ("Third Reconsideration Order")*, MM Docket No. 92-266 and MM Docket No. 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994).

[3] 47 C.F.R. § 76.922(b)(1). Interim rules and policies governing a cost-of-service showing are set forth in the *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 93-215, FCC 94-39, 9 FCC Rcd 4527 (1994).

[4] Communications Act § 623(i), 47 U.S.C. §543(i).

[5] *Id.*

[6] 47 C.F.R. § 76.923(l). The Commission may alter this cost averaging approach as a result of our cost studies. *See Second Reconsideration Order* at para. 219, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd at 4227 (1994).

[7] A small MSO is an MSO serving 250,000 or fewer total subscribers that owns only systems with less than 10,000 subscribers each and has an average system size of 1,000 or fewer subscribers. *See* 47 C.F.R. § 76.922(b)(5)(A).

[8] *See Report and Order and Further Notice of Proposed Rulemaking* at para. 272-279, MM Docket No. 93-215, FCC 94-39, 9 FCC Rcd at 4668-4672 (1994).

[9] 47 C.F.R. § 76.922(b)(4)(A)(i). Low-price systems also are eligible for transition treatment. Low-price systems are those (1) whose March 31, 1994 rate is below their March 31, 1994 benchmark rate or (2) whose March 31, 1994 rate is above their March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below their March 31, 1994 benchmark rate, as determined under FCC Form 1200. 47 C.F.R. § 76.922(b)(4)(B).

adjustments as determined under FCC Form 1200,[10] pending completion of our cost studies.

4. In addition, independent small systems and those owned by small MSOs may elect to make streamlined rate reductions under which they reduce each billed item of regulated cable service as of March 31, 1994 by 14% instead of setting rates based on 17% competitive rate reductions from September 30, 1992 levels.[11] This reduces administrative burdens by eliminating the need for these small systems to complete FCC Forms 1200 and 1205, and by eliminating the requirements to unbundle equipment and installation charges from programming service charges, and to set equipment and installation charges at actual cost.[12]

5. On a going-forward basis, the Commission has provided cable operators an incentive to add new programming. Under the revised rules, all operators may introduce New Product Tiers which they are permitted to price as they elect, subject to certain conditions.[13] They also may add new channels to regulated service tiers and recover a flat mark-up fee, again subject to certain restrictions.[14] Initially, we decided to give small systems an alternative with respect to the pricing of new channels added to regulated tiers. In lieu of recovering the flat mark-up fee for such new channels, our revised rules would have allowed small systems to pass through to subscribers the costs of new headend equipment for adding not more than seven new channels to regulated service tiers over the next three years.[15] The amount the qualifying small system could recover was to be limited to the actual cost of the headend equipment necessary to add a channel, not to exceed $5,000 per channel, plus the channel's licensing fee, if any.[16] The cost of the headend equipment would be amortized over the useful life of the equipment and small systems will be allowed

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[10] 47 C.F.R. § 76.922(b)(4)(A)(iii).

[11] 47 C.F.R. § 76.922(b)(5)(B). Streamlined rate reductions will be available to small systems pending completion of the Commission's cost studies.

[12] *See Second Reconsideration Order* at paras. 209, 210, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd at 4221-4222 (1994). This administrative relief may be terminated upon completion of cost studies by the Commission and development of average equipment cost schedules.

[13] *See Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-286, summarized at 59 Fed. Reg. 62614 (December 6, 1994).

[14] *Id.*

[15] *Id.*

[16] *Id.*

an 11.25% return on the undepreciated investment.[17] Upon reconsideration, we have chosen to permit some smaller systems to take both the flat fee mark-up and the headend adjustment when adding channels to regulated tiers.[18]

6. The Cable Telecommunications Association ("CATA" or "the Association"), the Small Cable Business Association ("SCBA"), and other groups generally believe that our efforts have not produced the intended result of reducing administrative burdens and costs for smaller systems. Preliminarily, industry associations and individual operators assert that small systems face higher costs than other cable operators. In our *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking* we sought comment on definitions of small businesses that could be used to define eligibility for any special rate or administrative treatment this Commission may adopt.[19] In response, a number of commenters point out that smaller systems do not qualify for the volume discounts offered by equipment and program suppliers to larger systems.[20] In addition, commenters observe that a smaller system serving a large rural area faces increased construction costs due to the increased amount of cable that must be installed to reach the entire area and increased operating costs given the greater amount of facilities that must be maintained.[21] Moreover, commenters note that the total costs for which a small system is responsible must be recovered from a small subscriber base. Thus, as Avenue TV Cable points out, although the cost of installing a headend and a mile of cable may not vary significantly from system to system, smaller systems will have fewer subscribers from whom to recover such costs.[22] As CATA succinctly states: "[B]asic mathematics . . . dictates that fixed costs spread out over fewer

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[17] *Id.*

[18] *See Seventh Order on Reconsideration*, MM Docket No. 92-266, FCC 95-8, released January 5, 1995.

[19] *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking ("Fifth Reconsideration Order")*, MM Docket No. 93- 215 and MM Docket No. 92-266, FCC 94-234, 9 FCC Rcd 5327 (1994). In a subsequent proceeding we will summarize and address comments regarding whether to retain our existing definitions or adopt new definitions of small operators and small MSOs for purposes of reducing regulatory burdens.

[20] *See, e.g.*, Joint Comments of Cable Operators ("Cole") at 6; Comments of Avenue TV Cable *et al.* ("Avenue") at 5, 9-10. These comments were submitted in response to the *Fifth Reconsideration Order*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-234, 9 FCC Rcd 5327 (1994). *See* n. 19, *supra*.

[21] *See, e.g.*, Avenue Comments at 4-5.

[22] Avenue Comments at 5.

subscribers produces less revenue."[23] Although our current rules take into account the number of subscribers a system has, the commenters are unanimous that the rules do not do so adequately.

7. Separately, commenters suggest that the cost of complying with rate regulation is itself unduly burdensome for certain smaller systems. These comments indicate that smaller systems lack the in-house staff necessary to analyze and comply with existing rules and lack the resources to hire outside legal and accounting assistance to handle such matters.[24] Again, the comments reflect the fact that while the cost of understanding and completing rate regulation forms, like other fixed costs, may be comparable among systems of varying sizes, a smaller system must spread these costs among a limited subscriber base, thus raising the effective cost of compliance for these systems.[25] Accordingly, commenters assert that our rules impinge on their ability to earn a profit, and that time and money spent in following our regulations adversely affect their ability to provide and improve service to their subscribers.

8. Compounding these problems, according to some commenters, is the reduced opportunity for revenue that small systems face as the result of numerous factors. These factors include the reduced demand for local advertising on their systems and the lower per-subscriber revenues that smaller systems typically recover. These factors often are amplified when small systems operate in rural areas where incomes are lower.[26] The comments reflect a need for prompt relief from these burdens for certain small systems.[27]

9. CATA further asserts that complexities in our rules, and the cost of enforcing them, have discouraged local franchising authorities in smaller communities from seeking certification.[28] While CATA highlights the fact that, even in these circumstances, the mere potential of rate regulation hinders small systems in their attempts to obtain financing and capital, thus increasing their cost of doing business, we are equally concerned that there are local franchising authorities which desire to regulate basic rates but which lack the resources to do so in accordance with our existing rules.

10. Based on these factors, these groups have urged the Commission to adopt

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[23] CATA Comments at 7.

[24] Cole Comments at 6.

[25] Avenue Comments at 6-7.

[26] Avenue Comment at 10-14.

[27] SCBA Comments at 14-15.

[28] *See Letter from CATA to Chairman Reed E. Hundt*, dated September 23, 1994 ("CATA letter").

different and less stringent rules for small cable companies. For example, SCBA states that small cable companies need benchmark adjustments to offset higher costs of programming and lower amounts of unregulated revenue, and that under benchmark regulation, small systems must be able to recover headend costs and high per subscriber capital costs when adding channels.[29] In comments and in a letter to Chairman Reed E. Hundt, CATA proposes an alternative rate regulation scheme that differs significantly from the present method of rate regulation which CATA, like the other commenters, claims is too complicated and burdensome.[30]

III. THE CATA PROPOSAL

11. CATA's proposal is as follows: The Commission should permit local franchising authorities and small systems to create their own alternative rate regulation plan. CATA states that alternative regulation should be available to all small systems of 1,000 or fewer subscribers regardless of whether they are currently subject to regulation and without regard to system ownership or affiliation with an MSO of any size. CATA envisions that the parties could agree to regulate rates for the basic service and cable programming service ("CPS") tiers, as well as going-forward, inflation, and external cost issues. Rate increases also could be agreed to in advance. If a small system and a local franchising authority entered into an alternative regulation plan affecting the CPS tier, subscribers could still file a rate complaint with the Commission.[31] In reviewing such a complaint, CATA asserts that the Commission should give "great weight" to local franchising authority determinations regarding rates for the CPS tier. If the Commission determines that a local franchising authority has made a reasonable attempt to apply the 1992 Cable Act's statutory criteria, the Commission would dismiss the complaint. To relieve burdens on small systems, CATA suggests that such alternative agreements need not be based on the Commission's benchmark/cost-of-service rules or forms but would be required to meet the regulatory criteria of the 1992 Cable Act. Thus, for an alternative rate regulation agreement to be effective, a local franchising authority would first be required to evaluate certain factors, discussed below, when agreeing to the rates charged by the eligible small system. A small system could appeal to the Commission a rate decision reached under an alternative regulatory plan. As part of alternative regulation, a local franchising authority would certify with the Commission simply by providing written notification that it plans to regulate rates using an alternative plan, and that it has procedures in place to provide interested parties access to the process. It would not submit an FCC Form 328.

12. Under CATA's proposal, both the small system and the local franchising

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[29] *See* Supplemental Comments of SCBA.

[30] *See* CATA letter.

[31] Section 623(c)(1)(B) of the Communications Act requires the Commission to resolve such subscriber complaints. 47 U.S.C. § 543(c)(1)(B).

authority would have to consent to the alternative regulatory framework. If the parties could not agree on an alternative approach, the local franchising authority would regulate rates, if at all, using Commission rules.

IV. DISCUSSION

A. Requirements Under The Communications Act

13. Based on comments received in response to the *Fifth Reconsideration Order*, and in light of other pending petitions for reconsideration, we reconsider on our own motion the *Second Reconsideration Order* as it relates to rate regulation of small systems.[32] We believe that, subject to modifications discussed below, the alternative rate regulation framework proposed by CATA is consistent with the spirit and the letter of the Communications Act.[33]

14. We believe that alternative rate regulation agreements for small systems will further the congressional goal of reducing administrative burdens on small systems while ensuring reasonable rates. With respect to rates, our fundamental duty under the Communications Act and, more particularly, the 1992 Cable Act, is to adopt regulations that ensure the reasonableness of the rates charged to subscribers of systems that are not subject to effective competition[34] while minimizing the regulatory burdens imposed upon all parties,

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[32] *Second Reconsideration Order*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994). In light of pending petitions for reconsideration of the *Second Reconsideration Order*, the Commission retains jurisdiction to grant reconsideration on its own motion. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F. 2d 37, 48, n. 51 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914, n. 8 (1990). *See also Order*, MM Docket No. 92-266, FCC 93-372, n. 1, summarized at 41 Fed. Reg. 41042 (August 2, 1993).

[33] SCBA supports the CATA plan; however, it also states that many small system issues will not be resolved by adoption of an alternative rate regulation scheme. SCBA urges the Commission to continue to review SCBA's proposals for addressing those issues, and to provide small systems with additional administrative and substantive relief from the benchmark/cost-of-service rules. *See* Supplemental Comments of SCBA. *See also* para. 10, *supra*. We agree that many issues concerning small systems remain pending, and we will continue to review the proposals of SCBA and others in order to create permanent regulations that alleviate small system burdens.

[34] Communications Act § 623(b)(1), 47 U.S.C. § 543(b)(1) (regulation of basic tier rates); Communications Act § 623(c)(1), 47 U.S.C. § 543(c)(1) (regulation of cable programming services).

including cable operators and local franchising authorities.[35] Thus, fulfillment of the statute requires us to balance these competing objectives. Accordingly, rather than dictating specific rules of general applicability, Congress granted the Commission the discretion to "adopt formulas or other mechanisms and procedures in complying" with its duties under the Communications Act.[36] In crafting these provisions, the overriding intent of Congress was to ensure that the Commission had the flexibility it needed to address the many considerations that Congress knew the Commission would face in adopting a regulatory scheme to govern rates charged by cable operators:

> Rather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas or other mechanisms and procedures to carry out this purpose. The purposes of these changes is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.[37]

15. We believe that, in general, our rules strike the balance that Congress intended us to achieve in weighing the sometimes conflicting objectives of ensuring reasonable rates and reducing regulatory burdens. However, the record in these dockets indicate that our rules of general applicability may be inappropriate for the smallest of cable systems. From the perspective of these small systems, our general rules with respect to the regulation of rates can sometimes fail to fulfill the statutory mandate to reduce regulatory burdens. For some small systems, attempting to spread the cost of compliance over a limited subscriber base may, in individual cases, impede the growth and development of those systems and threaten to frustrate the intent of Congress in enacting the 1992 Cable Act "to ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems . . . ."[38]

16. Congress acknowledged the special circumstances faced by small systems by specifically directing the Commission to reduce the administrative burdens and cost of compliance for them.[39] We believe that Section 623(i) of the Communications Act authorizes us to devise an alternative scheme with respect to eligible small systems that meets the statutory directive to reduce regulatory burdens imposed upon them. We believe that this goal can best be achieved by permitting local franchising authorities and eligible systems

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[35] Communications Act § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

[36] Communications Act § 623(b)(2)(B), 47 U.S.C. § 543(b)(2)(B).

[37] H. Rep. 862, 102d Cong., 2d Sess. 62 (1992).

[38] 1992 Cable Act § 2(b)(3).

[39] Communications Act § 623(i), 47 U.S.C. 543(i).

discretion to opt, by mutual agreement, for an alternative form of rate regulation that will involve a traditional bargaining process guided by the specific criteria set forth in the Communications Act as being relevant to the establishment of rates for basic services[40] and cable programming services.[41] This framework will free both the cable operator and the local franchising authority from the burdens and costs of analyzing and applying our benchmark and cost-of-service rules.[42]

17. While minimizing regulatory burdens, the alternative rate regulation agreements also will further the goal of ensuring reasonable rates by requiring local franchising authorities to take into account specific factors, identified by Congress, when imposing rate regulations for both the basic service tier and cable programming service tiers. With respect to basic service, those criteria are:

> [1] the rates for cable systems, if any, that are subject to effective competition;
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> [2] the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B) [Communications Act § 623 (b)(7)(B), 47 U.S.C. § 543(b)(7)(B)], and changes in such costs;
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> [3] only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;
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> [4] the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;
>
> [5] the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
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> [6] any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under

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[40] Communications Act § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C).

[41] Communications Act § 623(c)(2), 47 U.S.C. § 543(c)(2).

[42] *See* Communications Act § 623(i), 47 U.S.C. 543(i) (mandating reduced burdens for small systems); Communications Act § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A) (mandating reduced burdens for franchising authorities).

the franchise; and

[7] a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1) [Communications Act § 623 (b)(1), 47 U.S.C. § 543(b)(1)].[43]

18. Among other factors, the criteria to be used in establishing the rates to be charged for cable programming services are:

> [1] the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;
>
> [2] the rates for cable systems, if any, that are subject to effective competition;
>
> [3] the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;
>
> [4] the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;
>
> [5] capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and
>
> [6] the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.[44]

19. We believe the rules we adopt here properly take into account these statutory factors. As a preliminary matter, we note that alternative rate regulation agreements will present an option for local franchising authorities and small systems. Both parties remain free to insist on analysis under our existing rules, which we have already determined take into account the statutory factors. In addition, we believe that small systems and local franchising authorities in markets where small systems provide service are likely to be familiar with the facts and circumstances underlying the factors for their particular markets. Moreover, the statutory factors must be taken into account in negotiating alternative rate regulation agreements.

20. Given its knowledge of local conditions and its experience with the cable operator, the local franchising authority often will be in the best position to assess the relative

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[43] Communications Act § 623(b)(2)(C), 47 U.S.C. § 543(b)(2)(C) .

[44] Communications Act § 623(c)(2), 47 U.S.C. § 543(C)(2).

importance of these criteria and to gather the relevant facts accordingly. Moreover, since a small system is likely to be located in an area with a relatively small population, we expect that the local franchising authority will be particularly responsive to the needs and desires of cable subscribers. This circumstance should give the local franchising authority substantial encouragement and leverage to guard against any attempt by the cable operator to view the alternative framework as an avenue to achieve unreasonable rates. Indeed, unless and until an alternative rate agreement is reached, the local franchising authority will always be able to rely upon the general benchmark/cost-of-service rules, further ensuring the reasonableness of the rates permitted under an alternative rate regulation agreement. Thus, we conclude that rates subject to alternative rate regulation agreements by small systems will be reasonable.

21. For these reasons, we conclude that in addition to furthering the Communications Act's mandates to reduce regulatory burdens, alternative rate regulation agreements also are consistent with the 1992 Cable Act's intent to ensure that cable operators' rates are reasonable. Further, we believe that alternative rate regulation agreements will assist the Commission in ensuring that rates for cable programming services are not unreasonable.[45] As part of the alternative process, certified local franchising authorities are required to take into account relevant statutory factors to ensure that rates for CPS tiers are not unreasonable before entering into the negotiated agreement.[46] The Commission, however, shall retain jurisdiction over cable programming service rates.[47] Accordingly, we will establish an alternative form of rate regulation for independent small systems and small systems owned by small MSOs based upon CATA's suggestions.[48] We limit availability of this alternative process to independent small systems and small systems owned by small MSOs because we believe that larger systems have the financial and administrative resources necessary to comply with our benchmark and cost-of-service rate regulations. However, we may modify our eligibility standards in response to action we take in our proceeding on system size definitions.[49]

22. Although the alternative regulatory framework we adopt today contemplates a consensual, negotiated agreement between a qualifying cable operator not subject to effective competition and a local franchising authority, this plan borrows heavily from our existing

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[45] *See* Communications Act § 623(c)(1), 47 U.S.C. § 543(c)(1).

[46] *See infra*, para. 26.

[47] *See* Communications Act § 623(c)(2), 47 U.S.C. §543(c)(2).

[48] A number of commenters have argued that our rules should not distinguish between small systems on the basis of affiliation with larger systems or MSOs. We will resolve that issue as part of our comprehensive treatment of system size definitions. *See* n. 19, *supra*.

[49] *See Fifth Reconsideration Order*, MM Docket No. 92-266 and MM Docket No. 93-215, FCC 94-234, 9 FCC Rcd 5327 (1994).

rules.[50] As discussed below, the local franchising authority must be certified in accordance with our standard procedures. Before entering into an alternative rate regulation agreement, the local franchising authority must take into account the relevant criteria specified by Congress and must provide for public notice and comment. Finally, all alternative rate regulation agreements will be subject to Commission review, as mandated by the Communications Act.[51] For data collection purposes, and to assist the Commission in evaluating complaints, eligible cable operators must file with the Commission a copy of the operative alternative rate regulation agreement within 30 days after its effective date.

23. We have previously interpreted Section 623(j) of the Communications Act to preclude grandfathering rate agreements entered into after July 1, 1990, in part because we concluded that grandfathering such agreements would conflict with the 1992 Cable Act's intent to abrogate rate agreements entered into after July 1, 1990.[52] The rules we adopt today, permitting certified local franchising authorities to enter into agreements with qualifying cable operators with respect to rates, will be applied in the context of our existing cable rate regulation rules. These rules will provide a framework consistent with the statute, under which any such agreements will be negotiated. In addition, our rules will require local franchising authorities to take into account specific factors identified by Congress when determining rates for both basic and CPS tiers. In light of this requirement, we find such alternative rate agreements, developed in accordance with the statutory factors Congress identified for establishing rules to ensure that basic rates were reasonable and that CPS rates were not unreasonable, consistent with the Communications Act. As such, these agreements do not pose the kinds of conflicts with the 1992 Cable Act that we previously identified when we interpreted Section 623(j) as obviating rate agreements entered into after July 1, 1990.

B. Alternative Rate Agreements

24. As with any local franchising authority seeking to enforce rate regulations, a local franchising authority that elects to regulate pursuant to an alternative rate agreement must file the certification required by Section 623(a)(3) of the Communications Act and our rules.[53] The certification process shall be governed by our existing rules applicable to local

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[50] *See* Communications Act § 623(a)(1), 47 U.S.C. § 543(a)(1).

[51] *See* Communications Act § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

[52] Communications Act § 623(j), 47 U.S.C. § 543(j). *See Rate Order*, 8 FCC Rcd at 5926 (1993).

[53] 47 C.F.R. § 76.910. Local franchising authorities electing to enter into alternative rate regulation agreements shall properly complete and file FCC Form 328 with the Commission. CATA suggests that a local franchising authority could certify by providing written notification to the Commission that it had agreed with a qualifying system to opt for alternative rate regulation, and that it will provide a reasonable opportunity for interested

franchising authorities who wish to regulate cable operators according to the benchmark and cost-of-service rules.[54] No alternative rate regulation agreement will be effective until the effective date of the certification.[55] However, this does not preclude a local franchising authority that has yet to be certified from entering into an alternative rate agreement that is conditioned upon the effectiveness of the local franchising authority's certification. Alternatively, the parties may wait until after the franchising authority is certified to begin their negotiations. A local franchising authority that already is certified by the Commission may enter into an alternative rate agreement with the cable operator at any time. We note that the cable operator will be subject to the standard benchmark/cost-of-service rules upon the expiration of an alternative rate agreement. Thus, the local franchising authority shall accept as reasonable the basic service rate in effect at the time the agreement expires and may apply benchmark/cost-of-service rules on a going-forward basis to determine the reasonableness of proposed changes to basic service rates stemming from external costs, inflation, and the addition, deletion, or substitution of channels.[56]

25. The alternative approach may be pursued only by agreement of both the cable operator and the local franchising authority. To ensure maximum freedom from regulatory constraints, we will not establish any requirements to control the negotiation process. We note, however, that the scope of alternative agreements is limited exclusively to the regulation of rates charged for basic service and CPS tiers and the equipment used to receive these tiers.[57] Moreover, the intention of the alternative framework is not only to ease the cost of

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parties to make their views known. *See* CATA Letter. This suggested approach differs little from our current rules (which require completion and filing of one-page form), except that the Commission would be informed at the time a local franchising authority certifies that it is electing alternative rate regulation. We do not believe that local franchising authorities will necessarily have made that decision at the time they seek certification. We do not wish to cut short the period of time in which local franchising authorities have to consider the best approach to rate regulation. As our current rules place no greater burden on local franchising authorities than would CATA's approach, we decline to adopt CATA's suggestion.

[54] 47 C.F.R. § 76.910.

[55] Communications Act § 623(b)(4), 47 U.S.C. § 543(b)(4).

[56] *See* 47 C.F.R. §§ 76.922(d)(3)(x), 76.922(d)(3)(xi), 76.922(e), 76.923.

[57] As part of alternative rate regulation, certified local franchising authorities may not enforce state/local negative option billing laws that conflict with federal negative option billing rules. *See* 47 C.F.R. § 76.981. *See also Memorandum Opinion & Order*, LOI-93-14, DA 95-60 (Cab. Serv. Bur. Jan. 20, 1995); *Memorandum Opinion & Order*, LOI-93-2, DA 95-61 (Cab. Serv. Bur. Jan. 20, 1995); Consolidated *Memorandum Opinion and Order*, LOI-93-1, *et al.*, DA 95-106 (Cab. Serv. Bur. Jan. 25, 1995). There are numerous provisions of federal law which may not be waived, even by agreement of the local

compliance with our rules but to ensure that eligible small systems are not required to reduce rates more than required by those rules. Therefore, an alternative rate agreement shall be unenforceable if it requires the cable operator to charge rates lower than would be permitted under the benchmark or cost-of-service rules.

26. In establishing rates, the local franchising authority must take into account the statutory criteria set forth in Sections 623(b)(2)(C) and (b)(3) of the Communications Act with respect to rates for basic services and equipment, and the criteria identified in Section 623(c)(2) of the Communications Act with respect to the rates for cable programming services and equipment. Based upon our own consideration of those criteria, we agree with CATA that, with respect to eligible small systems, the local franchising authority is in the best position to assess the weight to be given each element as it pertains to a particular cable operator in a specific franchise area.

27. Section 623(a)(3)(C) of the Communications Act requires a local franchising authority to "provide a reasonable opportunity for consideration of the views of interested parties" in the course of rate regulation proceedings.[58] Although this provision is applicable to rate proceedings regardless of whether the alternative procedure is followed, we expect this provision to be particularly significant in the context of alternative rate regulation agreements. Active involvement by interested parties at an early stage of the proceedings, i.e., prior to final adoption of an agreement, should reduce the occurrence of complaints after the alternative agreement is implemented. Thus, the local franchising authority shall provide a reasonable opportunity for comment by interested parties, including subscribers, and, based upon its consideration of such comments, modify the agreement to the extent it deems appropriate before submitting the proposal to the cable operator. The local franchising authority need solicit public comment only once and thus is not precluded from entering into an alternative agreement that differs from a proposal that is presented for public comment.

C. Dispute Resolution

28. Once a cable operator is subject to rate regulation, the Communications Act and our rules provide various mechanisms for resolving disputes regarding rates and the enforcement of regulations by local franchising authorities. Subscribers and other interested parties may appeal to the Commission a rate decision made by a certified local franchising

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franchising authority and the small system, unless waivers are provided for in the Commission's rules. These provisions include, but are not limited to, geographically uniform rates structures, tier buy-through prohibitions, technical standards, must-carry obligations, and retransmission consent. *See* 47 C.F.R. §§ 76.984, 76.921, 76.605, 76.56, 76.64.

[58] The franchising authority must certify to the Commission that its procedural law and regulations provide for such an opportunity. *See* Communications Act § 623(b)(3)(C), 47 U.S.C. § 543(b)(3)(C); 47 C.F.R. § 76.910.

authority concerning the basic service tier.[59] Our rules also provide for Commission resolution of complaints regarding rates for CPS tiers.[60] The Commission also may review disputes between cable operators and certified local franchising authorities relating to the administration of regulations governing basic service tier rates.[61]

29. An appeal of a local franchising authority decision approving an alternative rate regulation agreement as it applies to basic service tier rates may be filed with the Commission under our regular procedures.[62] Since we have determined that the agreed upon rate is by definition a reasonable rate, the issue before the Commission will be whether the small system is charging the agreed upon rate and whether the agreement was entered into consistent with our requirements.[63]

30. We also believe it would be useful for potential complainants regarding CPS rates to attempt to resolve their complaints with the local franchising authority when CPS rates are subject to an alternative rate regulation agreement. Given the local franchising authority's role as a party to the agreement, we believe that many CPS rate disputes can be resolved at that level. Thus, we will require as a prerequisite to a CPS complaint to the Commission involving an alternative rate regulation agreement that the complainant provide evidence that he or she was denied the requested relief from the local franchising authority. As with basic service rates, in an FCC complaint the Commission will determine whether the rates are consistent with the agreement and our requirements.[64]

31. The Commission will resolve all CPS rate complaints pending at the time an alternative rate regulation agreement becomes effective under rules in effect at the time the rates were charged. Parties to an alternative rate regulation agreement must abide by the Commission's decision regarding appropriate remedies for unreasonable rates charged prior to the effective date of an alternative rate regulation agreement. However, the parties remain at liberty to determine reasonable CPS rates to be charged upon the effective date of an alternative rate regulation agreement. We do not believe this will hinder the negotiation process or implementation of an alternative rate regulation agreement because both local

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[59] 47 C.F.R. § 76.944.

[60] 47 C.F.R. § 76.950.

[61] 47 C.F.R. § 76.944.

[62] *Id.*

[63] Our procedural requirements are particularly important here where the reasonableness of the rates is based not on an objective standard but on a negotiation process. In addition, we would not countenance alternative rate regulation agreements that were illegally obtained.

[64] *See* n. 63, *supra*.

franchising authorities and cable operators are served with copies of FCC Form 329 complaints filed with the Commission by a subscriber and will know the status of any complaints at the time negotiations commence. In addition, since entering into an alternative agreement is voluntary, the terms of the agreement shall be binding as between the cable operator and the local franchising authority such that neither party shall be permitted to seek from the Commission relief that is inconsistent with the agreement. Thus, a local franchising authority may not challenge a rate permitted under the terms of the agreement and a cable operator may not seek to increase its rates above what the agreement permits.

V. Regulatory Flexibility Act Analysis

32. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the *Eighth Order on Reconsideration* is as follows:

33. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

34 Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Rate Order*.[65]

35. Significant alternatives considered and rejected. In the course of this proceeding, petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission has attempted to accommodate the concerns expressed by these parties. In this *Order*, the Commission is providing relief to small systems and certified local franchising authorities by permitting them to enter into alternative rate regulation agreements that do not require completion of any forms.

VI. Paperwork Reduction Act

36. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the

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[65] *See Rate Order*, 8 FCC Rcd 5631 (1993).

Act.

VII. Ordering Clauses

37. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, and 543 the rules, requirements and policies discussed in this *Eighth Order on Reconsideration*, ARE ADOPTED and Sections 76.934 and 76.950 of the Commission's rules, 47 C.F.R. Section 76.934 and 47 C.F.R. Section 76.950 ARE AMENDED as set forth in Appendix A.

38. IT IS FURTHER ORDERED that, the requirements and regulations established in this decision shall become effective thirty days after publication in the Federal Register, with the exception of new reporting requirements which will become effective on that date or as soon thereafter as they may be approved by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 - CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended, 106 Stat. 1460.

2. Section 76.934 is amended to add section (f):

§ 76.934 Small Systems and Small Operators

* * * * *

(f) Alternative rate regulation agreements.
(1) Local franchising authorities, certified pursuant to § 76.910 of this subpart, independent small systems, and small systems owned by small multiple system operators as defined by §§ 76.901 and 76.922(b)(5)(A) of this subpart may enter into alternative rate regulation agreements affecting the basic service tier and the cable programming service tier. (i) Small systems must file with the Commission a copy of the operative alternative rate regulation agreement within 30 days after its effective date.

(2) Alternative rate regulation agreements affecting the basic service tier shall take into account the following: (i) the rates for cable systems that are subject to effective competition; (ii) the direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to §§ 76.56 and 76.64 of this subpart, and changes in such costs; (iii) only such portion of the joint and common costs of obtaining, transmitting, and otherwise providing such signals as is determined to be reasonably and properly allocable to the basic service tier, and changes in such costs; (iv) the revenues received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier; (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers; (vi) any amount required to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and (vii) a reasonable profit.

The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(3) Alternative rate regulation agreements affecting the cable programming service tier shall take into account, among other factors, the following: (i) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors; (ii) the rates for cable systems, if any, that are subject to effective competition; (iii) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices; (iv) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis; (v) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and (vi) the revenues received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned. The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(4) Certified local franchising authorities shall provide a reasonable opportunity for consideration of the views of interested parties prior to finally entering into an alternative rate regulation agreement.

(5) A basic service rate decision by a certified local franchising authority made pursuant to an alternative rate regulation agreement may be appealed by an interested party to the Commission pursuant to §76.944 as if the decision were made according to §§ 76.922 and 76.923.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-43
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 92-266
Act of 1992: Rate Regulation	)	

NINTH ORDER ON RECONSIDERATION

Adopted: February 3, 1995 Released: February 6, 1995

By the Commission:

I. Introduction

1. In this Ninth Order on Reconsideration, the Commission on its own motion reconsiders the provision in its *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking* ("*Second Reconsideration Order*")[1] which prohibits small systems and low-price systems that have been provided with transition relief to adjust their transition rates to reflect increases in inflation.

II. Inflation Adjustments for Systems Eligible for Transition Relief

A. *Background*

2. In the *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266 ("*Rate Order*"), we developed a benchmark formula for the purpose of establishing initial rates for regulated services.[2] Under the benchmark approach, regulated

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[1] *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994).

[2] *Report and Order and Further Notice of Proposed Rulemaking* ("*Rate Order*"), MM Docket No. 92-266, 93-177, 8 FCC Rcd 5631 (1993) at para. 14 n.29, para. 387, n.946.

cable systems were required to use a formula established to calculate an applicable benchmark -- an estimate of the rate that a cable system with similar characteristics, but subject to effective competition, would charge.[3] Cable systems whose rates exceeded the applicable benchmark were required to reduce their rates either to the benchmark or by 10%, whichever reduction was less.[4] The 10% "competitive differential" represented the average difference that the Commission determined existed between the rates of competitive and noncompetitive systems.[5] For those cases in which the benchmark approach may not produce fully compensatory rates, operators were given the option of establishing rates based on costs pursuant to individual cost-of-service showings.[6]

3. In the *Second Order on Reconsideration*, we refined the econometric model, recalculated the competitive differential, and concluded that a competitive differential of 17% more accurately estimates the difference between effectively competitive and noncompetitive cable rates.[7] Accordingly, we required most systems with rates above the benchmark to either reduce their regulated rates to a level that represented their September 30, 1992 regulated revenues, reduced by 17% (mitigated by annual inflation increases, changes in external costs and changes in the number of programming channels) or to submit a cost-of-service showing supporting higher rates.[4] To compute this "full reduction rate," cable operators were required to take their September 30, 1992 regulated revenues per subscriber and subtract 17%.[5] After reducing their September 30, 1992 regulated revenues per subscriber by 17%, operators added adjustments for the following elements: (1) the inflation that occurred between October 1, 1992 and September 1, 1993; (2) changes in external costs; and (3) changes that resulted from the addition or deletion of program channels to regulated service tiers.[6]

4. We granted two classes of cable operators transition relief by not requiring them to implement the full 17% reduction rate, pending a review of such operators' prices and costs. The first category of systems that were provided with transition relief is systems

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[3] *Id.* at para.

[4] *Id.* at para.

[5] *Id.*

[6] *Rate Order* at paras. 258-265.

[7] *Second Order on Reconsideration* at para. 2.

[4] *Id.* at para. 109.

[5] *Id.*

[6] *See* 47 C.F.R. § 76.922(d)-(e).

owned by "small operators," defined as operators serving 15,000 or fewer subscribers and not affiliated with a larger operator.[7] Systems owned by small operators were not required to reduce rates by 17%.[8] Rather, these operators were allowed to use the permitted rate charged on March 31, 1994 to establish initial restructured rates, and adjust accordingly to reflect external costs until we completed our study of prices and costs experienced by small operators.[9]

5. The second category of systems that were provided with transition relief is systems that charge relatively low prices for regulated services. Low-price systems are defined as systems (1) whose March 31, 1994 rates were below the benchmark rate or (2) whose March 31, 1994 rates were above their March 31, 1994 benchmark rates but whose March 31, 1994 full reduction rates are below their March 31, 1994 benchmark rates as determined under FCC Form 1200.[10] During the transition period, systems whose March 31, 1994 rates were below the benchmark rate had their rates capped at March 31, 1994 levels.[11] Systems whose March 31, 1994 rates were above the benchmark, but whose full reduction rates were below the benchmark were only required to reduce their rates to, but not below, the benchmark.

6. We stated that we would not require small cable operators and low-price systems that were provided with transition relief to make full competitive rate reductions until we collected and analyzed data about such operators' prices and costs, and determined whether the competitive rate reduction was appropriate.[12] We stated that after the Commission staff

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[7] *Id.* at paras. 109-110, 117-122.

[8] *Id.* at para. 127.

[9] *Id.* at paras. 132-133.

[10] *Id.* at paras. 111, 123-126.

[11] *Id.* at para. 127.

[12] *Id.* at paras. 132-133. We adopted the transition approach for cable systems owned by small operators because there was evidence that smaller operators may face higher than average costs, although due to the absence of industry-wide cost data, we were unable to conclude that small operators face systematically higher costs. *Id.* at para. 118. We also expressed concern that some small operators may not have the financial resources to withstand the impact of a significant rate reduction. *Id.*

We adopted the transition approach for low-price systems because these systems were charging comparatively low prices when measured against other noncompetitive systems. *Id.* at para. 124. Although we did not find conclusive evidence that low-price systems are not exercising market power, we expressed concern that, because their prices are significantly

completes a cost study "in the near future" we would require systems eligible for transition relief to make the full reduction unless the analysis reveals that application of the 17% competitive differential to these systems is inappropriate.[13]

7. Systems entitled to transition relief have been permitted to increase their rates to reflect increases in external costs and a per channel adjustment when increasing the number of channels.[14] We decided not to allow such systems, however, to increase their transition rates to reflect increases in inflation until the transition rate equals their full reduction rate.[15] We determined that because the full reduction rate rises with inflation, as well as with changes in external costs and channel changes, a transition rate system's hypothetical full reduction rate may eventually exceed the transition rate.[16] We decided, therefore, that if a system's transition rate and the full reduction rate became equal, that system would be entitled to take advantage of inflation adjustments.[17]

8. We also stated that after we have determined whether we should require transition relief operators to reduce their rates in accordance with an appropriate competitive differential, those systems will be entitled to an aggregate inflation adjustment equal to the GNP-PI inflation adjustments for the period beginning October 1, 1992 through the most recent June 30.[18] For those systems that have already received some inflation adjustment because their hypothetical full reduction rate exceeded their transition rate, we said that the system will receive the net of the aggregate inflation adjustment minus any inflation adjustment already received.[19] We found that such systems will be eligible for additional inflation adjustments on an annual basis, but no earlier than September 30 of each year to reflect the final GNP-PI through June 30 of the applicable year.[20]

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lower than those charged by most noncompetitive systems, low-price systems may face unusual demand, costs or other influences that have not been captured in our analysis. *Id.* at para. 125.

[13] *Id.* at paras. 111, 132.

[14] *Id.* at para. 130.

[15] *Id.* at para. 131.

[16] *Id.*

[17] *Id.*

[18] *Id.* at para. 134.

[19] *Id.*

[20] *Id.*

B. *Discussion*

9. On our own motion, we find that low-price systems and small operators that have been provided with transition relief should no longer be prevented from adjusting their rates to reflect changes in inflation.[21] In the *Second Order on Reconsideration*, we decided to defer implementing the inflation adjustment for transition relief systems because we were not yet requiring them to reduce their rates by the competitive differential.[22] We decided that we would provide transition relief systems with the opportunity to make inflation adjustments after we developed a better picture of the price/cost profiles of these systems and determined the appropriate competitive differential for such systems.[23] In making this decision, we stated that we expected to complete the collection of cost/price data within nine months.[24]

10. Because we have not yet completed our collection of these data and nearly ten months have passed since we released the *Second Order on Reconsideration*, we find that it would be unfair to delay any further implementation of inflation adjustments for transition relief systems. We are concerned that a further delay in permitting transition relief systems to make inflation adjustments could be particularly burdensome on small operators because many small operators may not have the financial resources to withstand the impact of not being able to make inflation adjustments. A further delay in implementing the inflation adjustment for small operators may jeopardize the financial integrity of many of those systems because they may not be large enough to have access to sufficient bank loans, credit lines, or other sources of financing.

11. We also find that low-price systems should not be required to experience any further delays in implementing inflation adjustments. In the *Second Order on Reconsideration*, we found that because their prices are significantly lower than those charged by most noncompetitive systems, low price systems may face unusual demand, costs or other influences that were not captured in our analysis. A further delay in allowing low-price systems to make inflation adjustments may, therefore, impose a substantial burden upon those operators.

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[21] In light of pending petitions for reconsideration of the *Second Reconsideration Order*, the Commission retains jurisdiction to grant reconsideration on its own motion. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F. 2d 37, 48, n. 51 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914, n. 8 (1990). *See also Order*, MM Docket No. 92-266, FCC 93-372, n. 1, summarized at 41 Fed. Reg. 41042 (August 2, 1993).

[22] *Id.* at para. 131.

[23] *Id.* at para. 134.

[24] *Id.* at para. 111.

12. Accordingly, between April 1, 1995 and August 31, 1995, cable operators that have been afforded transition relief may adjust their rates to reflect the net of a 5.21% inflation adjustment, minus any inflation adjustments they have already received. This adjustment accounts for the 3% inflation factor that regulated cable operators were permitted to recover for the September 30, 1992 to September 30, 1993 period[25] and the 2.15% inflation factor that operators were permitted to recover between October 1, 1994 and August 31, 1995 for the October 1, 1993 to June 30, 1994 period.[26]

13. With one exception, however, transition relief systems will not receive the full 5.21% inflation adjustment because, under the old rules, they received an inflation adjustment from September 30, 1992 to the date they were subject to regulation for the purpose of establishing their initial rates prior to May 15, 1994. The exception is for most low price systems that had their March 31, 1994 rates above the benchmark, but their full reduction rate below the benchmark. When these systems set their rates for the period after May 15, 1994 they lost the inflation adjustment they received prior to May 15, 1994, because they were required to reduce their rates to the benchmark. Therefore, they will be permitted to adjust their rates to reflect the full 5.21% inflation factor. If, however, their actual post-May 15, 1994 rate reduction was less than their earlier inflation adjustment, they will be permitted to receive the 5.21% inflation adjustment minus the difference between their inflation adjustment and their actual post-May 15, 1994 rate reduction.

14. We determined in the Second Order on Reconsideration that, because the full reduction rate rises with inflation, a transition rate system's hypothetical full reduction rate may eventually exceed the transition rate.[27] We decided that a transition rate system will be entitled to take an inflation adjustment once the hypothetical full reduction rate and transition rate became equal.[28] Therefore, those transition relief systems that have already received this inflation adjustment, because their hypothetical full reduction rate exceeded their transition rate, will only permitted to receive the net of the aggregate inflation adjustment minus any inflation adjustment already received.[29]

15. With the inflation adjustment they received prior to May 15, 1994 and the inflation adjustment we are granting them now, transition relief systems will be able to adjust their rates to reflect the same inflation adjustment that we have granted all other operators.

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[25] *See* FCC Form 1200, Module G, Line G10.

[26] Bureau of Economic Analysis, U.S. Department of Commerce, Survey of Current Business, Vol. 74, No. 8 at 24, Table 7.3 (August, 1994).

[27] *Second Order on Reconsideration* at para. 131.

[28] *Id.*

[29] *See Id.*

Moreover, in the future, all transition relief systems may join other cable operators in making inflation adjustments on an annual basis, no earlier than October 1 of each year and no later than August 31 of the following year to reflect the final GNP-PI through June 30 of the applicable year.

III. Regulatory Flexibility Act Analysis

16. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the Ninth Order on Reconsideration is as follows:

17. Need and purpose of this action. The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992), pertaining to rate regulation, adopts revised rules and procedures intended to ensure that cable services are offered at reasonable rates with minimum regulatory and administrative burdens on cable entities.

18. Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the *Report and Order and Further Notice of Proposed Rulemaking*.[30]

19. Significant alternatives considered and rejected. In the course of this proceeding, petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission has attempted to accommodate the concerns expressed by these parties. In this order, the Commission is providing relief to small systems and low-price systems by permitting them to adjust their transition rates with an inflation adjustment.

IV. Paperwork Reduction Act

20. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and are found to impose a new information collection requirement on the public. Implementation of the new requirement will be subject to approval by the Office of Management and Budget.

V. Ordering Clauses

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612, 622(c) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i),

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[30] 8 FCC Rcd 5631 (1993).

154(j), 303(r), 532, 542(c) and 543, the rules, requirements and policies discussed in this Ninth Order on Reconsideration, ARE ADOPTED and Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix A.

22. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

23. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective on April 1, 1995.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47, Part 76 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.922 is amended to revise paragraph (d)(2 to read as follows:

Section 76.922 Rates for the basic service tier and cable programming service tiers.

* * * * *

(d) Inflation Adjustments. The residual component of a system's permitted charge may be adjusted annually for inflation. The annual inflation adjustment shall be based on inflation occurring from June 30 of the previous year to June 30 of the year in which the inflation adjustment is made, except that the first annual inflation adjustment shall cover inflation from September 30, 1993 until June 30 of the year in which the inflation adjustment is made. The adjustment may be made after September 30, but no later than August 31, of the next calendar year. Adjustments shall be based on changes in the Gross National Product Price Index as published by the Bureau of Economic Analysis of the United States Department of Commerce. Cable systems that establish a transition rate pursuant to paragraph (b)(4) above may not begin adjusting rates on account of inflation before April 1, 1995. Between April 1, 1995 and August 31, 1995 cable systems that established a transition rate may adjust their rates to reflect the net of a 5.21% inflation adjustment minus any inflation adjustments they have already received. Low price systems that had their March 31, 1994 rates above the benchmark, but their full reduction rate below the benchmark will be permitted to adjust their rates to reflect the full 5.21% inflation factor unless the rate reduction was less than the inflation adjustment received on an FCC Form 393 for rates established prior to May 15, 1994. If the rate reduction established by a low price system that reduced its rate to the benchmark was less than the inflation adjustment received on an FCC Form 393, the system will be permitted to receive the 5.21% inflation adjustment minus the difference between the rate reduction and the inflation adjustment the system made on its FCC Form 393. Cable systems that established a transition rate may make future inflation adjustments on an annual basis with all other cable operators, no earlier than October 1 of each year and no later than August 31 of the following year to reflect the final GNP-PI through June 30 of the applicable year.

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FCC 95-55

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:

Report and Plan for Meeting
State and Local Government
Public Safety Agency Spectrum
Needs Through the Year 2010

REPORT and PLAN

Adopted: February 9, 1995 **Released: February 9, 1995**

By the Commission:

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I. EXECUTIVE SUMMARY

A. Objective

The objective of this Report is to present the results of a Commission study of the current and future spectrum needs of public safety agencies. The information and alternatives contained in this Report are the basis for the Commission's plan to ensure that the spectrum requirements of public safety agencies are accommodated. This Report was produced pursuant to Section 6002 of the Omnibus Budget Reconciliation Act of 1993 (the Budget Act).[1] Title VI of the Budget Act requires the Commission to determine (1) the extent to which issuing licenses through competitive bidding can be used to increase Federal revenues; (2) the future spectrum requirements for public and private uses, including State and local government public safety agencies; (3) the spectrum allocation actions necessary to accommodate those uses; and (4) the actions necessary to promote the efficient use of the spectrum, including spectrum management techniques to promote increased shared use of the spectrum that does not cause harmful interference as a means of increasing commercial access.

Section 6002 of the Budget Act specifically addresses the needs of the public safety services and mandates that the Commission, by February 9, 1995, submit to Congress a study of current and future spectrum needs of state and local government public safety agencies through the year 2010, and develop a specific plan to ensure that adequate frequencies are made available to public safety licensees. The Budget Act also requires that, at least biannually, NTIA and the Commission conduct joint spectrum planning with respect to the future spectrum requirements for public safety agencies and spectrum allocation actions necessary to accommodate those needs.[2]

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6001(a)(3), 107 Stat. 312 (enacted Aug. 10, 1993).

[2] Commission staff members have met with National Telecommunications and Information Administration (NTIA) staff members several times since the inception of this study specifically to discuss public safety needs and spectrum allocations.

B. Approach

In conducting its study of public safety spectrum requirements the Commission solicited comment from the major public safety communications associations.[3] These organizations were asked to: (1) review licensing data by band and geographic area and compare the results with the projections from a 1985 study[4] of future public safety licensing and spectrum needs; (2) identify factors, such as increases in population, increased mobility, increased crime, and new services like mobile video and the Intelligent Transportation System (ITS), that may affect future needs; (3) develop spectrum needs projections to the year 2010, by geographic area and band, based on historical data and identified growth factors; and (4) discuss the potential to increase the channel capacity of existing allocations as a result of increased technical flexibility and more stringent spectrum efficiency standards.

The following associations contributed to this Report through submissions on the record: The Association of Public-Safety Communications Officials International, Inc. (APCO), the Public Safety Communications Council (PSCC),[5] the American Public Transit Association (APTA),[6] and the ITS AMERICA Advanced Public Transit Systems Committee (ITS).[7]

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[3] *See* letters from Ralph A. Haller, Chief, Private Radio Bureau (subsequently reorganized into the Wireless Telecommunications Bureau) to James R. Rand, Executive Director, Association of Public-Safety Communications Officials and to L. Miller, American Association of State Highway and Transportation Officials, on behalf of the Public Safety Communications Council (Apr. 4, 1994), contained in the Appendix to this Report.

[4] *See* PR Docket No. 84-232, Order, FCC 85-329, 50 FR 32239 (adopted June 21, 1985).

[5] PSCC membership is comprised of AASHTO, the American Association of State Highway and Transportation Officials, FCCA, the Forestry Conservation Communications Association, IMSA, the International Municipal Signal Association, IAFC, the International Association of Fire Chiefs, and PCIA, the Personal Communications Industry Association (formerly NABER, the National Association of Business and Educational Radio). These organizations provide coordination of radio frequency assignments and use for all types of public safety disciplines at the state and local government levels, and for emergency medical services by non-government operators for licensees in the Fire, Forestry-Conservation, Highway Maintenance, Emergency Medical, and Special Emergency Radio Services.

[6] APTA represents the interests of public transit providers and suppliers of goods and services to the transit industry.

[7] APTA and ITS supplied comments in response to the letter to PSCC from Ralph Haller. ITS AMERICA Advanced Public Transit Systems Committee was formerly called IVHS AMERICA Advanced Public Transit Systems Committee.

C. Summary of Comments from Public Safety Community

Public safety requirements can be separated into two categories. The first category consists of channels for the conventional one-way and two-way voice and data communications requiring relatively narrow spectrum bandwidth per channel. The second category consists of future systems that will offer advanced applications such as high-speed transmission of full motion video and transmission of high resolution images, such as mug shots and fingerprints, that may require substantially wider spectrum bands. We refer to these future systems as "new wideband technologies."

APCO contends that for conventional voice and data communications alone, the public safety community needs a new spectrum allocation of 6 megahertz for nationwide use, plus an additional spectrum allocation of 12 megahertz for use in metropolitan areas. APCO projects that for new wideband technologies the public safety community will need an allocation of at least 25 megahertz by the year 2000, and an additional 50 megahertz by the year 2010.[8] APCO's total projected spectrum need of 75 megahertz for new wideband technologies is in addition to the total 18 megahertz projected for conventional voice and data communications. In its comments, PSCC provided a substantial amount of public safety licensing statistics as well as anecdotal evidence of spectrum shortages in particular geographic areas. The PSCC comments, however, did not focus on quantitative projections of additional spectrum allocation needs.[9]

APTA stated that the demand for public transit services is growing and it anticipates the spectrum requirements for communications essential to operating our nation's public transportation systems will increase by as much as a factor of 2 in the 450 MHz and 800 MHz bands.[10] APTA did not specify whether these needs could be met by simply obtaining licenses for additional channels using current spectrum resources or if an additional spectrum allocation would be needed. ITS also indicated a doubling of required spectrum capacity due to growth in use of public transportation and adoption of "intelligent transportation system technologies."[11] ITS stated that at least 50 percent of this increased capacity would be accommodated by technological improvements. It is unclear from ITS's filing whether these needs could be met by obtaining additional licenses to use currently available spectrum or whether an additional spectrum allocation would be required.

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[8] APCO Comments at i.

[9] PSCC filed its comments at or about the same time as APCO and neither refuted nor expressed support for APCO's projections.

[10] APTA Comments at 3.

[11] ITS Comments, Appendix A, at 3.

D. Summary of Analysis and Conclusions

The public safety community representatives submitting comments in this proceeding all maintain that their communications needs are increasing. We agree that communications play a vital role in the services provided by public safety agencies, and we recognize that the increasing demands placed on these agencies' communications systems will pose difficult challenges in coming years. We have concluded that the Commission must address these challenges and have developed a Plan to ensure that adequate spectrum capacity is available to meet the needs of the public safety community. A summary of this Plan is presented in the next Section of this Report.

Our review of the comments filed in this proceeding, however, leads us to conclude that more information from public safety agencies and other interested parties is necessary to enable us to formulate with any precision the scope of the public safety community's spectrum needs. With regard to conventional voice and data communications, for example, APCO has provided evidence of spectrum shortages in particular areas of the nation, but has not submitted technical analyses to support its projected need for additional conventional voice and data spectrum allocations.

With regard to wideband communications, we agree with APCO that additional spectrum may be needed for new wideband technologies, but we conclude that specific, quantified assessments of the scope of this need have yet to be undertaken. As discussed below, the Commission concludes that spectrum needed for the new wideband technologies could be shared with Federal users who will be using similar equipment for identical applications.[12]

Our study of the current and future spectrum needs of state and local government public safety agencies, which has been undertaken pursuant to the Budget Act and which

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[12] The Budget Act requires that the Secretary of Commerce identify at least 200 megahertz of spectrum currently allocated for use by Federal Government agencies for transfer to the Commission for use by the private sector. In addition, the Budget Act requires that 50 megahertz of the spectrum identified be recommended for immediate reallocation, with the remaining 150 megahertz to be made available by January of 2004. *See* note 1, *supra*. The Department of Commerce released a Preliminary Spectrum Reallocation Report (Preliminary Report) on February 10, 1994, *see* NTIA Special Publication 94-27, making a preliminary identification of 200 megahertz of spectrum for reallocation. The Commission prepared a report in response to the Preliminary Report that discusses possible alternative bands of spectrum, and presents a supplemental spectrum reallocation plan that the Commission believes would enhance the viability of the reallocated spectrum for commercial and local government use. *See* Report from the Federal Communications Commission to Ronald H. Brown, Secretary, U.S. Department of Commerce, Regarding the Preliminary Spectrum Reallocation Report, FCC 94-213, Aug. 9, 1994.

forms the basis for this Report, has led us to conclude that two principal steps should be taken to ensure that these spectrum needs are addressed.

First, we plan to initiate a proceeding in the near future that will be targeted to the development of the type of specific, quantified data necessary to enable us better to evaluate the spectrum needs of public safety agencies. In this connection, we intend to work closely with all interested parties involved in public safety communications issues in order to ensure that the necessary information and data are developed in a comprehensive and systematic manner, so that these materials form a sufficient record upon which our future decisions can rely. Upon the completion of this data collection proceeding we will take the formal step of deciding whether to initiate a spectrum allocation proceeding.

Second, we have identified several technical, economic, and regulatory alternatives that the public safety community should consider utilizing to increase the communications capacity of current spectrum allocations. We conclude that implementation of these alternatives by public safety agencies may meet at least some of the public safety agencies' requirements.

E. The Commission Plan

Part of the Commission's mandate under Title VI of the Budget Act is to develop a specific plan to ensure that adequate frequencies are made available to public safety licensees. The Commission will take the following steps to ensure that the public safety community's spectrum needs are met through the year 2010. These steps are discussed in greater detail in Section IV of this Report.

- **The Commission will initiate a data collection proceeding in the near term to collect the detailed information necessary for the Commission to make informed decisions regarding additional spectrum allocations that may be necessary to meet the communications needs of state and local government public safety agencies.**

- **The Wireless Telecommunications Bureau has recently appointed a Public Safety Liaison Officer to work with public safety agencies and their representatives, including APCO Project 25. The Public Safety Liaison Officer will solicit informal comments on potential improvements to the public safety licensing process, such as allowing frequency coordinators or regional planners to take more responsibility for frequency assignments, and creating an advisory committee to oversee public safety communications issues.**

- **The Commission, in this subsequent proceeding, will also seek comment on the options for increased spectrum efficiency outlined in Section IV of this Report. These options are as follows:**
  - **Technical options**
    - **Further development of the type of spectrum efficiency proposals initiated in the refarming proceeding[13]**
    - **Use of digital technologies and digital access techniques**
    - **Use of sectored antenna systems**
  - **Economic options**
    - **Greater use of commercial service providers**
    - **Provision for increased use of exclusive channel assignments in bands below 470 MHz**
    - **Leasing of excess public safety spectrum capacity for other wireless services**
    - **Allocation of new spectrum for use only by efficient radio systems**
  - **Regulatory options**
    - **Consolidation of smaller services into broader service pools**
    - **Increased sharing of spectrum and systems among state, local, and Federal public safety agencies**
    - **Increased State role in public safety spectrum planning and management**

[13] PR Docket No. 92-235, Notice of Proposed Rule Making, 7 FCC Rcd 8105 (1992).

- **The Commission will consider the spectrum that is to be released by the Federal Government for private sector use when assessing alternatives for addressing the spectrum needs of the public safety services, particularly the new wideband technologies.**

- **The Commission will continue to respond to emergency spectrum shortages on a case-by-case basis.**

- **The Commission will continue to work with NTIA and other interested parties to determine to what extent sharing of Federal and non-Federal spectrum is feasible.**

II. BACKGROUND

A. Public Safety Communications

Spectrum management authority in the United States is shared between the Federal Communications Commission and the President. The Communications Act of 1934[14] established the Commission and gave it authority to assign frequencies to radio stations in the United States, its territories and possessions, except for those frequencies allocated to the Federal Government. The NTIA, an administration within the Department of Commerce, assigns frequencies to Federal Government stations under delegated authority of the President. The Commission allocates and assigns frequencies for use by entities other than the Federal Government.

The public safety community is one of the most important users of the non-Federal radio spectrum. Sufficient mobile communication capacity for agencies charged with protecting the public welfare is of critical importance to the overall well-being of this nation. Every person in the country is dependent, directly or indirectly, on the many services provided by public safety and emergency medical entities. Wireless communication provides a vital component in the nation's public safety and emergency medical infrastructure. Agencies involved in the protection of life and property are able to do their jobs effectively and efficiently only by making extensive use of a wide array of wireless communications options available to them. Full use of these options requires that sufficient spectrum capacity be available and that spectrum use be well planned and coordinated to assure that the diverse needs of public safety entities can be satisfied.

The public safety services considered in this Report include the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, Emergency Medical, and Special Emergency Radio Services.[15] These services were created over a number of years as individual public safety groups petitioned the Commission for spectrum allocations, starting with the Police Radio Service in 1937. Each of these services is described briefly below.

The *Police Radio Service* is used for mobile communications to handle both police operations such as dispatching vehicular units and coordinating tactical operations (*e.g.*, stakeouts) and administrative matters (deployment of patrols, status of units). Any non-federal governmental entity or institution authorized by law to provide its own police protection is eligible in this service.

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[14] 47 U.S.C. § 151 *et seq.*

[15] The public safety services are licensed under Part 90 of the Commission's Rules, 47 CFR Part 90.

The *Fire Radio Service* uses mobile communications for both administrative and operational purposes. In those localities where the fire department has responsibility for providing rescue squad and ambulance service, the Fire Radio Service frequencies are used for the dispatch of ambulances, the communication of medical information to personnel at the site of an emergency, and the transmission of biomedical telemetry from the emergency site or the ambulance to hospital emergency room personnel. Any non-federal governmental entity (typically a firefighting organization) is eligible in this service with the permission of the local government having jurisdiction over the area to be served.

The *Highway Maintenance Radio Service* provides communications related to the highway activities of any non-federal governmental entity requiring communications essential to its official highway activities. Licensees use this service in performing a wide range of functions, including road maintenance and paving operations. Frequencies in this service are also used for communications related to ice and snow removal, removal of disabled vehicles, and patrol of tunnels, bridges and turnpikes. Two-way mobile radio is often used in this service to recall or reroute highway crews and vehicles to meet changing priorities due to highway and weather emergencies.

The *Forestry-Conservation Radio Service* has responsibility for law enforcement (*e.g.*, park police and rangers who enforce fish, game, and environmental statutes), fire prevention control, and emergency medical service. Licensees in this service provide fire detection and control for one-half billion acres of non-federal forest lands. Any non-federal governmental entity is eligible in this service. Also, persons or organizations charged with specific forestry-conservation activities are eligible to operate in this service with the support of the local government having jurisdiction over the area to be served.

The *Local Government Radio Service* is for communications involving the day-to-day operations of governmental entities other than the Federal Government. Entities eligible to operate in this service include states, U.S. territories and possessions, counties, cities, towns, and many other types of specialized governmental districts and authorities (*e.g.*, flood control, water, sanitation) for a variety of public safety and welfare uses. All public safety entities are permitted to use this service and often include law enforcement, fire protection, highway maintenance, lifeguard and rescue service users.

The *Emergency Medical Radio Service* provides radio communications for the actual delivery of emergency medical treatment including (1) transmission between rescuers at the scene of an accident or disaster and physicians at a hospital; and (2) the dispatch of emergency medical providers transporting injured persons to hospitals and trauma centers. Persons or entities engaged in the provision of basic or advanced life-support services on an ongoing basis are eligible to operate in this service.

The *Special Emergency Radio Service* may be used by medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, communications standby facilities, and emergency repair of public communications facilities. Entities not meeting these eligibility criteria may also be licensed in this service solely to provide service to Special Emergency Radio Service eligibles on one-way paging-only frequencies below 800 MHz, as specified in Sections 90.33 and 90.53(b)(4) or (26), 47 CFR §§ 90.33 and 90.53(b)(4) or (26).

Mobile radio communications have become vital tools for all aspects of public safety operations. The most well-known example of the use of radio communications for public safety is in the police service. Over a half-century ago, police officers patrolled city neighborhoods on foot. To communicate with headquarters, they walked to special call-boxes that were dedicated telephone circuits to headquarter dispatchers. Improvements in technology led to mobile radios becoming standard equipment in police and other public safety vehicles. Initially, the radio equipment was of a size and weight that made it suitable only for vehicular use. The use of such radio equipment in police vehicles enabled police to respond more quickly to requests for help, and cover larger areas with fewer officers.

A significant change in law enforcement communications over the last ten years has been the wide-spread use of portable radios made possible by the development of micro-miniaturization. New portable radios enable local authorities to go back to "neighborhood policing" on foot and bicycles; this trend has received renewed interest due to its effectiveness in crime prevention and community awareness and involvement. Portable radios provide officers on foot or on bicycles with instant command and control ability as well as the capability to call for assistance from other officers at any time.[16]

Portable radios have also become essential for firefighters for on-scene coordination, forestry conservation personnel addressing forest fires and other emergencies in remote locations, highway maintenance agencies coordinating emergency road repairs and snow removal, and for EMS teams communication with hospitals. For all of these public safety services, radio communicating is a vital tool which enables them to fulfill their obligations to protect the safety of life and property in a modern society.

A critical element of public safety communications systems is the need to accommodate peaks in service demand that occur during multiple emergencies. There must be sufficient capacity to handle not only normal day-to-day communications needs, but also large scale emergencies such as civil disturbances, storms, major fires, earthquakes, and other natural and man-made disasters.

[16] APCO Comments at 3.

The demand for land mobile wireless communications, including that used for the public safety services, has grown rapidly in recent years. There are several factors that reflect the growth in demand for public safety wireless communications. These factors include the increasing reliance on wireless communications by public safety personnel, rising demands on public safety services as measured by increases in crime and other factors, and anticipated growth in the number of public safety personnel. Another factor that is leading to an explosive demand in all communications services, including public safety, is the improvement in semiconductor technology that has led to the introduction of increasingly advanced, economically viable information access and communications services. In the near future, the content of public safety communications will include not just voice, but also fingerprints, mug shots, building diagrams, full motion video, and a host of other high speed data applications.[17] These new services will require additional radio spectrum and, in some cases, wide bandwidths to facilitate high speed transmission. These new technologies and their spectrum requirements are discussed in greater detail later in this Report.

Radio spectrum, a valuable but limited resource, has become vitally important to the nation's economic well-being. Advances in telecommunications technologies are spurring economic growth and generally improving the quality of life. Some of these technological advances could assist the public safety community significantly in performing its functions.

B. Current Public Safety Frequency Allocations

Public safety mobile service operations, other than radio paging, are usually two-way communications between a base and mobile station or between mobile stations. A mobile station is intended to be used while in motion or during stops at unspecified locations. The equipment used for mobile service includes base, repeater, vehicular, and handheld, portable stations. Public safety land mobile systems are sometimes multi-purpose systems; for example, law enforcement, natural resource, medical, and fire control services may be supported by the same radio system or network. The radio systems are purchased from commercial vendors and are often similar to those employed by federal entities for similar purposes.

Conventional voice and data systems use a single frequency or a pair of frequencies. Typically, a base station with a tall tower and an omnidirectional antenna is used to cover a large area. The base station uses a transmitter power of 50 to 100 watts. The Commission's licensing staff reports that the mobile units installed in vehicles typically use transmitter power of 100 watts and smaller antennas. Portable, hand-held units have very small antennas and use typically only 2 to 6 watts. Users communicate in a dispatch/supervisory mode (one-to-many) or communicate in a one-to-one mode while other users sometimes monitor

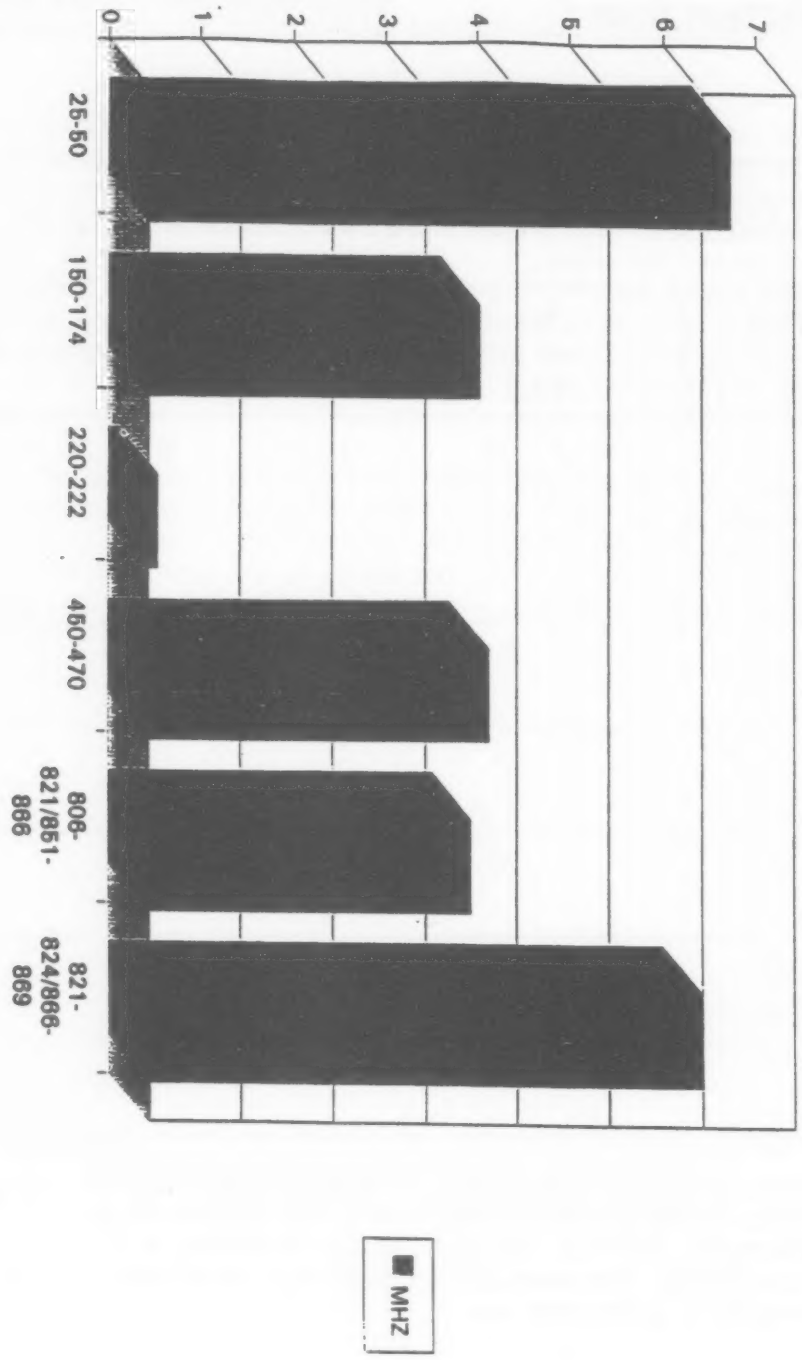
[17] *Id.* at i.

communications and take action as appropriate. Typical communications messages from mobile sources are of relatively short duration and typical channel hold times are quite short, usually less than one minute. Under these circumstances, one or more channels can often be shared by several independent users. Specific audio or sub-audio tones known as "tone-coded squelch" are used to permit any combination of the mobile radios to receive the radio transmission. A more advanced and efficient system is a *trunked system* that uses several frequency pairs integrated into a single system. When a user wants to transmit a message, the trunked system will automatically select a currently unused channel pair and assign it to the user. The user has the immediate use of a channel whenever any one of the trunked channel pairs is available.

The following table describes the specific frequency bands allocated to the public safety radio services, including the number of channels and approximate quantity of spectrum in each band. Immediately following this table are two charts. The first chart illustrates the various frequency bands allocated to the public safety radio services. The second chart illustrates the amount of spectrum allocated to each of the various wireless radio services, including public safety.

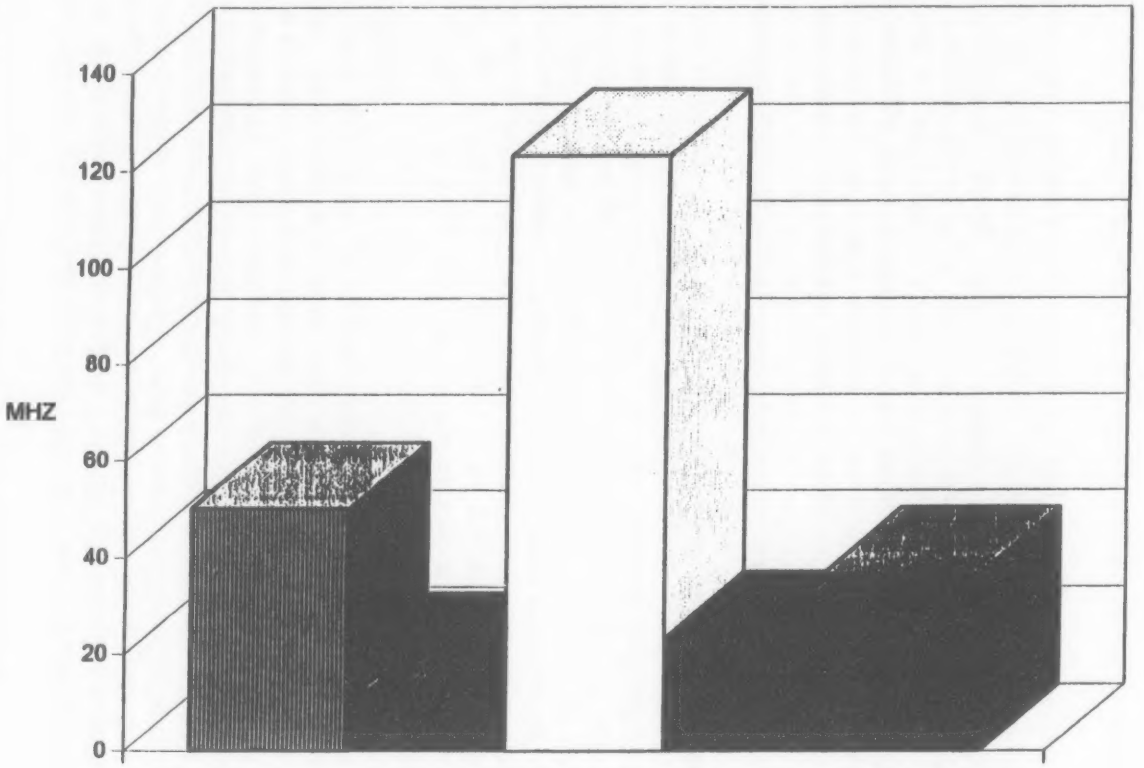
CURRENTLY ALLOCATED PUBLIC SAFETY RADIO SPECTRUM		
Frequency Band (MHz)	**Number of Channels**	**MHz (Approximate)**
25-50 (VHF low band)	315	6.3
150-174 (VHF high band)	242	3.6
220-222 (220 band)	10	0.1
450-470 (UHF band)	74	3.7
806-821/851-866 (800 bands)	70	3.5
821-824/866-869 (800 public safety bands)	230	6
TOTAL*	**941**	**23.2**

* Various amounts of spectrum have also been allocated in the 470-512 MHz band in 11 markets: Boston, Chicago, Dallas, Houston, Los Angeles, Miami, New York, Philadelphia, Pittsburgh, San Francisco, and Washington, D.C., ranging from 6 to 18 MHz. Microwave spectrum in the bands above 1000 MHz is also available for public safety use.


PUBLIC SAFETY SPECTRUM
0
1
2
3
4
5
6
7
25-50
150-174
220-222
450-470
806-821/851-866
821-824/866-869
MHZ

PUBLIC SAFETY SPECTRUM NEEDS

ALLOCATED LAND MOBILE SPECTRUM



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* VARIOUS AMOUNTS OF SPECTRUM HAVE ALSO BEEN ALLOCATED IN THE 470-512 MHZ BAND IN 11 MARKETS, BOSTON, CHICAGO, DALLAS, HOUSTON, LOS ANGELES, MIAMI, NEW YORK, PHILADELPHIA, PITTSBURGH, SAN FRANCISCO, AND WASHINGTON, D.C., RANGING FROM 6 TO 18 MHZ.

The VHF low and high bands and the UHF band are used primarily for non-trunked, conventional, dispatch voice communications. The VHF low band is subject to ionospherically propagated interference from distant stations during periods of high sun spot levels, and man-made noise, especially in urban areas, and is therefore not the most desirable band. The VHF high band and the UHF bands are more popular due to better noise and propagation properties. The 800 MHz bands are used for conventional and trunked systems. In the UHF and 800 MHz bands, channels are paired to allow use of repeater stations. Signals from a control station or mobile unit are transmitted on one frequency. The repeater retransmits the communication on another channel for reception by other control or mobile units. This system can provide greater geographic coverage than land mobile systems not employing repeaters.

Public safety entities also use fixed services to provide communications between specified fixed points. These are usually point-to-point systems operating in the microwave bands where the transmission of a radio frequency signal involves a single fixed transmitting location and a single fixed receiving location. A more complex type of fixed service is the point-to-multipoint system in which multiple transmitting or receiving fixed stations are involved. Fixed microwave services are licensed and regulated under Part 94 of the Commission's Rules, 47 CFR Part 94. The microwave spectrum is shared with other Part 90 private land mobile users, Part 74 and Part 78 broadcast service users, Part 21 and Part 22 common carrier users, and Part 80 and Part 87 aviation and marine service users.

C. Previous Commission Actions To Meet Spectrum Demand

The Commission has consistently been responsive to public safety spectrum needs. For example, in response to a 1983 congressional mandate[18] to study public safety spectrum needs, the Commission took a number of actions. We issued a Notice of Inquiry to solicit public comment on public safety spectrum needs.[19] We subsequently released a Private Radio Bureau report entitled *Future Public Safety Telecommunications Requirements*[20] that projected growth of public safety communications requirements through the year 2000, estimated the impact of new technologies on these projections, and presented a number of alternative means to meet future communications needs of the public safety radio services.

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[18] FCC Authorization Act of 1983, H.R. Report No. 356, 98th Cong., 1st Sess. 27 (1983).

[19] PR Docket No. 84-232, Notice of Inquiry, 49 FR 9754 (Mar. 15, 1984).

[20] *See* PR Docket No. 84-232, Order, FCC 85-329, 50 FR 32239 (adopted June 21, 1985).

Prior to the August, 1985 release of the *Future Public Safety Telecommunications Requirements* report, the Commission adopted a Notice of Proposed Rulemaking[21] (NPRM) in response to 1) a petition filed by the Land Mobile Communications Council (LMCC), and 2) an August, 1983 study by the Commission's Private Radio Bureau of the need for additional private land mobile spectrum through the year 2000, that proposed to allocate 32 megahertz of land mobile reserve spectrum and to apportion it among the Public Safety, Industrial/Land Transportation, Business Radio, and Specialized Mobile Radio Services.[22] The public safety community argued that the 3.6 megahertz of spectrum proposed in the NPRM was inadequate to meet its needs. Therefore, in the Report and Order[23] in this proceeding, the Commission allocated six megahertz of spectrum exclusively for public safety use anywhere in the nation. Twenty two megahertz of spectrum was divided among the Cellular, Private Land Mobile (other than public safety), and General Purpose Mobile Radio Services.[24]

The six megahertz reallocation to public safety in the GEN Docket No. 84-1233 and the 1985 Public Safety Study converged in a subsequent proceeding (National Plan proceeding) that developed and established rules and technical standards for the implementation of the national plan incorporating this six megahertz of public safety spectrum.[25] The National Plan proceeding established an advisory committee to develop a national public safety plan to govern the use of the six megahertz allocation, and defined 55 public safety regions in the U.S.[26]

The National Plan was intended to facilitate interoperability among communications systems to permit local, state, and federal agencies to coordinate their activities and to ensure efficient use of the spectrum allocated for public safety radio systems. While it is the Commission's belief that certain technical concerns must be addressed at the national level, the great diversity of needs in different areas of the country demand that input also be

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[21] GEN Docket No. 84-1233, Notice of Proposed Rule Making, FCC 84-575, 50 Fed Reg 1582, (adopted Nov. 21, 1984).

[22] *See id.* at para. 1.

[23] *See* GEN Docket No. 84-1233, Report and Order, 2 FCC Rcd 1825 (1986).

[24] Four megahertz was not allocated in this proceeding, but was subsequently allocated for use in an air-to-ground mobile telephony service.

[25] *See* GEN Docket No. 87-112, Report and Order, 3 FCC Rcd 905 (1986).

[26] *See* GEN Docket No. 87-112, Report and Order, 3 FCC Rcd 905 (1987). See GEN Docket No. 87-112, Memorandum Opinion and Order, 3 FCC Rcd 2113 (1988) for a description and list of the 55 regions. The national plan provides a regulatory framework for the 55 regional plans.

obtained at the state and local levels. Therefore, the National Plan focussed on general spectrum management issues while providing a framework that allowed regional public safety planning committees to develop plans tailored to their own particular communications needs. By using a two-pronged approach of regional and national planning, the Commission hoped to provide spectrum for all the country's public safety and special emergency entities, while also providing sufficient flexibility to allow regional planners to develop efficient and effective solutions to local public safety problems. The last of the 55 regional safety plans, for the state of Idaho, was approved on August 3, 1993. While a few regions that completed their plans several years ago have made significant progress in implementing their plans, most of the regions are still in the very early stages of implementing their plans. Therefore, it is still too early to judge how well these plans are working to satisfy the spectrum needs of the public safety community.

D. Pending Commission and Industry Actions

There are several pending proceedings under the Commission's jurisdiction and one industry standard-setting effort whose outcomes may influence greatly the ability of public safety users to use the current spectrum more efficiently. Within the Commission, the Refarming rule making proceeding could, if implemented, greatly increase channel capacity for public safety services.[27] The Commission is considering a petition filed by the New York City Public Safety Agencies to use UHF-TV Channel 16 in New York City, which would also enable them to implement spectrum efficient technologies in current frequency allocations. The APCO Project-25 industry standard-setting effort may also have a positive impact in improving channel capacity. These efforts are discussed in detail below.

1. Refarming

In July of 1991, the Commission released a Notice of Inquiry (NOI)[28] that sought information on any new technical, operational, or regulatory techniques that could promote more efficient use of the frequency bands below 512 MHz used by the private land mobile radio services, including the public safety services. The Commission used this NOI to adopt a Notice of Proposed Rule Making (NPRM)[29] proposing certain spectrum efficiency standards that require systems to be at least as efficient as some narrowband technologies, while providing technical flexibility. This NPRM also proposed to phase out type acceptance of, and thereby ultimately prohibit, spectrum inefficient technologies.

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[27] *See* PR Docket No. 91-170, Notice of Inquiry, 6 FCC Rcd 4126 (1991); PR Docket No. 92-235, Notice of Proposed Rule Making, 7 FCC Rcd 8105 (1992).

[28] *See id.*

[29] *See id.*

Refarming proposals include plans to narrow channel bandwidths over time; to provide for exclusive channel use below 470 MHz; to encourage technical flexibility and spectrum efficiency; to reduce maximum allowable power levels and antenna heights; and to allow trunking in bands below 800 MHz. One aspect of the refarming proposal that is of special interest for purposes of future public safety needs is the possibility of doubling or even tripling the present communications capacity by migration from 25 kHz channel bandwidth to 12.5 kHz, 6.25 kHz and 5 kHz channel bandwidths. Refarming of the private land mobile spectrum by implementing narrowband channels appears to be readily achievable from an engineering prospective. Implementation of narrowband technologies would result in at least a two- to three-fold increase in available voice channels for existing public safety systems.

We emphasize, of course, that the refarming rulemaking proceeding currently remains pending and no final action has been taken. Our discussion here seeks to illustrate the implications of the proposals in the NPRM, but is not intended to suggest any particular outcome in the rulemaking proceeding.

2. New York City Public Safety Petition

On April 6, 1992, the New York City Public Safety Agencies (Agencies) filed a Request for Waiver with the Commission, seeking waiver of Parts 2 and 90 of the Rules to permit the use of UHF-TV Channel 16 for public safety operations in New York City. The agencies filed a supplement to the original request on April 14, 1994, and a new Conditional Waiver Request on November 21, 1994. The latest request includes a comprehensive agreement reached between a coalition of television broadcasters operating in the metropolitan New York area, and a coalition of metropolitan New York public safety agencies. The agreement calls for the use of UHF-TV Channel 16 in the metropolitan New York area by public safety agencies for at least five years while these agencies work to convert their existing radio systems to more spectrum efficient technologies and modes of operation. The Commission solicited public comment on the latest waiver request on December 14, 1994, with final comments due by January 20, 1995, and we expect to take prompt action on this request.

3. Advanced Technologies and APCO-25

On September 7, 1988, the Commission released a Notice of Inquiry (*Notice*)[30] to obtain comment on trunking compatibility protocol standards for radio equipment operating in the 821-824/866-869 MHz public safety bands. In that *Notice*, the Commission examined

[30] *See* GEN Docket No. 88-441, Notice of Inquiry, 3 FCC Rcd 5399 (1988).

the possibility of establishing standards to increase interoperability among licensees using different types of trunked radio systems.[31]

The Commission concluded that trunking standards were not necessary to permit interoperability because users of analog-based radio systems can communicate with one another if they transmit on the same frequency and operate in the non-trunked (conventional) mode. We also recognized, however, that the next generation of radios is likely to use digital modulation and transmission techniques, and that digital systems may require some degree of standardization to enable system interoperability. The Commission initiated a Further Inquiry to explore the important issue of standards as well as the many other technical, economic, and regulatory issues that relate to the use of advanced technologies in the public safety services.[32]

APCO formed a working group (APCO Project 25) to explore the issues raised by the Commission in the Further Notice and to develop technical standards for the next generation of public safety radios. The benefits that public safety agencies anticipate from the standards being developed by APCO Project 25 include interoperability between agencies and between different levels of government, and competitive procurement of radio equipment. Other issues being discussed are how to achieve a graceful migration to digital technology and how to make more efficient use of public safety radio spectrum. According to APCO, when Project 25 technology is implemented, it will initially provide twice as many channels in the 450-512 MHz and 800 MHz bands by halving channels from their current 25 kHz bandwidth to 12.5 kHz. APCO also asserts that in the VHF high band, a reduction from the current 15 kHz channels to 12.5 kHz channels will provide at least a six-for-five gain, in addition to allowing use of adjacent channels in the same geographic areas. Project 25's ultimate goal is 6.25 kHz channels, or a four-to-one gain over current 25 kHz channels.[33] The outcome of Project 25 may increase channel capacity for certain users and should be considered in future spectrum planning.

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[31] *See* GEN Docket No. 88-441, Memorandum Opinion and Order, 4 FCC 3874 (1989).

[32] *See* GEN Docket No 88-441, Further Notice of Inquiry, 4 FCC Rcd 8519 (1989).

[33] J. Powell, "Project 25: An Overview of its Inception and Progress," *APCO Bulletin*, June 1994, at 38.

III. PROJECTED PUBLIC SAFETY SPECTRUM REQUIREMENTS

A. Spectrum Requirements Projected by Public Safety Community

1. Conventional Voice and Data Spectrum Requirements

The Commission requested that APCO and PSCC project their spectrum needs to the year 2010 by geographic area and frequency band. In response APCO contends that the public safety community needs 6 megahertz nationwide and an additional 12 megahertz in metropolitan areas for basic voice and data communications.[34] APCO does not, however, provide a detailed analysis supporting these projected needs, nor does it identify which metropolitan areas need an additional 12 megahertz of spectrum. Its report instead echoes the frustrations of PSCC regarding the difficulty in making such determinations given the dynamic state of land mobile radio technology, and changes in land mobile licensing and licensing data recordkeeping.[35]

APCO states that licensing data alone does not provide a reliable picture of frequency demand.[36] There are a finite number of radio frequencies available for licensing in a particular band or service. APCO states that "once all of the frequencies in a particular geographic area have been assigned, the number of new licenses issued will necessarily be very small, *notwithstanding what may be extraordinary demand for new licenses*."[37] This is demonstrated, APCO suggests, by looking at the number of unmet channel requests received by frequency coordinators. APCO's local frequency advisors in New York, Chicago, and Los Angeles report backlogs of long-pending requests for approximately 200 channels that they have been unable to satisfy.[38] APCO further contends that many public safety agencies in those and other major metropolitan areas have simply given up requesting channels, knowing that none are available.

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[34] APCO Comments at i.

[35] *Id.* at 7.

[36] *Id.*

[37] *Id.* at 7-8, (emphasis in original).

[38] In Southern California, there are 235 unfilled channel requests that date back to 1989. *See id.* at 9.

APCO states that there is a ceiling on the number of frequencies that can be assigned until new spectrum is made available. When the ceiling is lifted (as when the 800 MHz band became available) there is usually a flood of applications seeking those channels, reflecting pent up demand. For example, the number of applications coordinated by APCO from July 1, 1993, to June 30, 1994, for "new stations" or "new transmitters" was more than double the previous twelve months.[39] Most of that increase was for new 800 MHz systems.[40] APCO cites numerous statistics that reflect the growth in demand of public safety radio communications for various jurisdictions across the country.[41] APCO does not, however, provide detailed analysis to explain how it used these statistics to determine the amount of conventional-use spectrum it requested.

In response to our request to justify its projection of public safety needs, APCO filed additional information[42] that consisted primarily of examples of specific states that have depleted, or nearly depleted, the available VHF and UHF channels.[43] APCO also indicated that part of the spectrum congestion problem is caused by the number of individual public safety departments in close proximity that want their own systems. For example, the state of Georgia "has 159 counties, each with its own sheriff's department and government agencies."[44] Another example is Oklahoma, where "[f]ew agencies are able to afford 800 MHz systems and many small, rural agencies depend upon low cost used VHF equipment 'passed down' by larger agencies."[45] A discussion of ways to alleviate spectrum congestion for these types of situations through more efficient spectrum usage, as opposed to frequency allocations, follows in the analysis of projected spectrum needs, *infra*.

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[39] Applications requesting a "new station" increased from 5,148 to 11,362, and applications requesting a "new transmitter" increased from 26,460 to 66,828. *Id.* at 8. Note that some of these applications may reflect previously licensed facilities.

[40] *Id.*

[41] *Id.*

[42] *See* Letters from R. Gurss to K. Rackley, Private Radio Bureau, dated Sept. 22, 1994, Oct. 18, 1994 , and Nov. 1, 1994. Although the additional material submitted indicated the difficulty APCO has in finding unoccupied channels in the 800 MHz band to assign to public safety agencies, it does not demonstrate the extent to which already licensed public safety channels are being used as efficiently as possible.

[43] *See* Letter from R. Gurss to K. Rackley dated Sept. 22, 1994.

[44] *Id.* at 4.

[45] *Id.*

In its response to our request for needs projections, PSCC does not project spectrum requirements. Instead, PSCC focuses on the difficulty of projecting needs based on historical data and states that:[46]

> the Commission's license data base is a "paper" data base that shows only what the licensee is *authorized* to use, not what the licensed entity actually has in operation. The country's Public Safety communications facilities change every working day as licenses are issued, renewed, amended, cancelled or revoked, but all these actions are not always timely and accurately reflected in the data base.

Although PSCC does not provide specific spectrum projections, it does make several suggestions concerning administrative changes that may aid in future attempts to make such projections. For example, PSCC recommends that an "FCC Office of Public Safety" be established and also makes general suggestions about "changes in licensing methodology."[47] These suggestions will be explored as part of a new proceeding that we will initiate. This proceeding will focus on developing an information collection process to assure that the Commission is able, on an on-going basis, to evaluate public safety spectrum needs objectively.

APTA projects that its spectrum utilization in the 450 MHz and 800 MHz bands into the year 2010 will double. APTA states that this projection assumes that transit communications operators will continue to take advantage of spectrum conservation measures such as using "alternate means (wire or spread spectrum), the use of techniques such as trunking when practical, and the application of emerging spectrum efficient communication protocols."[48]

ITS predicts that by the year 2010 public transit will require more than double the amount of spectrum it has today. It bases these projected needs on (1) growth in fleet size, (2) an increase in "demand-responsive services" due to suburbanization and population aging, and (3) the adoption of "smart bus," intelligent transportation system technologies. ITS states that at least 50 percent of the growth in channel demand will be satisfied by refarming, trunking, and the GPS Automatic Vehicle Location service.[49]

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[46] PSCC Comments at 2-7, (emphasis in original).

[47] PSCC Comments at 8-11.

[48] APTA Comments at 3.

[49] ITS Comments at 2-3.

2. New Wideband Technologies

A myriad of new technologies is envisioned for use by the public safety services. These new technologies will allow police officers to perform in the field most of the functions currently tied to the permanent district station. This will encourage the community policing that seems to be increasingly embraced by the public. "By breaking the technological bands that tie the officers to the station, and to the police vehicle, we can encourage the beat team officers to spend their time working directly with the customers, using their communications 'tool kits' to set up 'mobile offices' in the community. The implementation of this type of technology is highly dependent upon both hard-wired and wireless data links."[50] These new technologies are likely to require a large portion of spectrum due to the large amount of high density data to be transmitted at high-speed.

Portable or laptop computer with wireless data transmission capabilities will allow police crime reports to be recorded in the field, make crime information instantly available and provide precise positioning data. Portable computers with wireless connections also will provide access to mainframe records management systems, allowing officers to conduct investigations without needing to return to a fixed location. Also envisioned are optical scanners that enable an officer to instantaneously compare fingerprints against those in an automated fingerprint identification system. This technology also might be extended to comparisons of prints found at crime scenes, thus expediting the investigative process.[51]

APCO projects that implementation of these future technologies will require at least 25 megahertz of spectrum by the year 2000, and an additional 50 megahertz by the year 2010. These estimates are based on a paper compiled by the APCO Spectrum Needs Task Force and information solicited from equipment manufacturers and others. These estimates take into consideration the data rate for various technologies, the number of estimated users for particular services, and the estimated usage per user per mobile/portable unit.[52]

B. Analysis of Projected Spectrum Needs

1. Conventional Voice and Data

The public safety community representatives that submitted comments for this Report all agreed that their communications needs are increasing. A significant portion of APCO's comments concentrated on the special requirements of public safety agencies that mandate

[50] *APCO Bulletin*, Mar. 1994.

[51] *Id.* at 16.

[52] APCO Comments at 16.

primary reliance on radio systems owned and operated by each agency. APCO states that commercial systems, such as cellular and PCS systems, may be useful for routine administrative communications, but are of little value for most public safety emergency communications because public safety agencies have critical needs for reliability, immediate response, universal coverage, signal quality and encryption.

The Commission does not question the need of public safety agencies to have ready access to wireless communications, particularly in situations involving imminent danger to life or property. We also understand that the special reliability and functionality requirements of public safety communications may not be fully realizable on commercially available systems designed to serve the public. We are not convinced, however, that the only way to achieve this access is on systems individually owned and operated by individual public safety agencies. In fact, there have been a number of cases where communities have maximized efficiency and minimized expenses by joining with other nearby communities to create a shared communications system. For example, in Hattiesburg, Alabama, with a shared system, "duplication of effort is eliminated, cost efficiencies are enhanced and political intervention is maintained at an acceptable level."[53] Another example is a trunked communications system that uses the frequencies of several municipalities to provide complete interagency communications in the Fort Bend County, Texas, system.[54] According to the Texas Sheriff's office, this system offers a "seamless and transparent communications system throughout the majority of southeast Texas."[55] There are numerous other examples of communities that have implemented trunking systems that serve several public safety departments and agencies, eliminating the need for the inefficient use by individually owned and operated systems.[56]

In addition to technologies readily available to the public safety community, commercial services can accommodate the special needs of public safety services through various software applications. Mobile satellite services provide commercially available wireless communications systems for safety of life and property operations. In this example, technology has provided at least part of the answer to the problem of obtaining ready access to a communications system in emergency situations. INMARSAT uses priority signalling for distress and safety communications in the maritime services while American Mobile Satellite Corporation (AMSC) has proposed dynamic frequency pooling to ensure availability to high

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[53] B. Falkner, "Paging Public Safety in Hattiesburg," *Radio Resource* (July-August 1994) at 31.

[54] R. Russek, "Texas Trunking, Fort Bend County 821 MHz System Matures," Communications (July 1994) at 34.

[55] *Id.* at 37.

[56] *Id.*

priority users. These systems also provide privacy through encryption. The same smart technology used in the satellite services could be explored for use in the terrestrial services.

Trunked radio systems offer another example of how priority access can be achieved on a commercially available wireless communications system. The sophisticated computer controls on multi-channel trunked radio systems permit these systems to provide just the type of priority channel access, which allows safety of life and property transmissions to preempt non-emergency administrative transmissions, that public safety agencies want and need. "With trunking, a single radio system shared by several agencies provides each agency with communications service virtually equivalent to having its own communications system. Shared trunked communications integrates dispatch, secure voice, data and telephone interconnect functions and coordinates communications among the sharing agencies."[57] In fact, this single capability of trunked systems is probably largely responsible for the big increase in the use of trunked systems by public safety agencies in recent years. The Orleans County, New York, system, which serves the Orleans County Sheriff, the New York State Police, three town police departments, 14 town highway departments, and other public service departments, such as mental health, public health, and emergency preparedness has implemented trunking.[58] Other municipalities that have implemented trunking include Martin County, Florida, the City and County of Honolulu, Hawaii, and the City of Oakland, California.[59] This same type of capability would enable public safety agencies to obtain priority access using commercial systems like SMRs, cellular, or PCS.

It is also important to note that the Federal Government's public safety agencies, which have the same needs for priority access and encryption, are taking a serious look at commercially available technologies. NTIA is required by the 1993 Budget Act to produce a "plan for Federal agencies with existing mobile radio systems to use more spectrum-efficient technologies that are at least as spectrum efficient and cost-effective as readily available commercial mobile radio systems."[60]

We conclude that more information is needed in order for us to determine whether additional spectrum allocations are necessary to satisfy the conventional voice and relatively

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[57] J. Suzuki, "The evolution of trunked radio communications systems," Supplement to *Mobile Radio Technology* (Aug. 1994).

[58] R. Russek, "Texas Trunking, Fort Bend County 821 MHz System Matures," *Communications* (July 1994) at 34.

[59] *Id.*

[60] *See* "Telecommunications Authorization Act of 1992," § 104(d)(3)-(4), Pub. L. No. 102-538, 106 Stat. 3533 (1992).

low-speed data wireless communications requirements of public safety agencies. Although APCO, for example, has quantified its spectrum needs, it has not provided any explanation as to how these projections were developed and how they relate to current and projected spectrum shortages. PSCC shared the concerns of the other public safety communications representatives that spectrum needs are growing, but it has provided no projections of additional needed spectrum allocations.

The insufficiencies in the current record have led us to conclude that a further proceeding is necessary to enable us to make informed decisions regarding the spectrum needs of public safety agencies. As we discuss elsewhere in this Report, we believe that there are a number of alternatives that state and local agencies can pursue in order to achieve more efficient utilization of their current spectrum. We also acknowledge, however, that some of these options involve expenditures that many state and local governments may find difficult to afford.

Our responsibilities under the Communications Act include the duty to make a public interest assessment of the extent to which spectrum -- a valuable, scarce, *public* resource -- should be made available to state and local governments in quantities that are designed to be sufficient to offset, at least to some degree, the costs that would be incurred by these governments introducing greater efficiencies in their use of current spectrum allocations. We believe that our obligation to make such an assessment is particularly important here because matters of public safety are at stake.

It is because of the serious dimensions of this assessment that we have decided to defer any definitive determination of the spectrum needs of state and local public safety agencies until we have collected more complete data. It is better, we believe, to delay our decision if this additional time can be used to gather the information necessary for informed judgments. We intend that the data collection proceeding that we propose to initiate will serve to fill the vacuum in the current record, thus enabling us to reach reasonable and defensible conclusions regarding the adequacy of frequency allocations for state and local public safety agencies.

In the next section of this Report, we discuss technical options, economic incentives, and regulatory actions that should be considered and implemented to the extent possible in conjunction with any efforts to allocate additional spectrum to the public safety services for conventional wireless voice and low-speed data communications.

2. New Wideband Technologies

The Commission agrees with the commenters that the new wideband technologies, which will allow the transmission of fingerprints, mug shots, and other high speed data applications, are likely to require a new spectrum allocation. We also recognize that these

high speed data applications are the potential harbingers of a new generation of law enforcement techniques that will strengthen government's hand in providing public safety.

Because of the importance of these potential applications, we are assigning a priority to our assessment of the amount of spectrum needed for these wideband technologies. The data collection proceeding which we will be initiating will draw attention to this issue. We will continue to work with the public safety community and NTIA to better define the amount of spectrum needed for these purposes.

IV. THE COMMISSION PLAN

Increasing demands are being placed on public safety wireless communications systems, especially in major metropolitan areas. It is therefore incumbent on the Commission, in its capacity as manager of non-Federal uses of the radio spectrum, including public safety uses, to alleviate shortages where they exist. Because the spectrum is a scarce natural resource it is also imperative that the Commission strive to ensure that the spectrum is used efficiently. This section lays out options that attempt to strike the appropriate balance between the wireless communications needs of the public safety community and recognition of the scarcity of the radio spectrum. The Budget Act requires the Commission to plan for the long term as well as the immediate needs of the public safety community. Therefore, it is important that we consider all alternatives that will enable public safety entities to satisfy their obligations to the American public while recognizing the need to use the increasingly scarce and valuable spectrum resource efficiently.

In order to fulfill our mandate under the Communications Act, and under the more recent requirements established in the Budget Act, we are adopting a Plan consisting of two major components. First, we will initiate in the near future a data collection proceeding intended to enable us to gather sufficient information regarding the spectrum needs of state and local government public safety agencies. This information will play an important role in our ability to make informed spectrum allocation decisions. An outline of our objectives in this data collection proceeding is presented in Part A of this Section.

Second, we have considered a variety of options to ensure that public safety spectrum is used efficiently and that public safety wireless communications needs are satisfied. The options we have considered are discussed in Part C of this Section.

A. Data Collection Proceeding

The difficulty we have had in defining state and local public safety agencies spectrum needs has convinced us of the need to create a mechanism to identify and collect data relevant for such a determination. Therefore, we plan to issue a Notice in the near future that will have two primary objectives. First, it will solicit information from public safety licensees about how they are using their current frequencies and any measures they are taking or plan to take to use them more efficiently in the future. Second, it will solicit information from the public safety community about anticipated wireless communications demands between now and the year 2010 that cannot be met using current public safety spectrum.

The first area on which the data collection proceeding will focus is the present and anticipated use of available and emerging wireless communications technologies to expand the capacity of existing wireless communications systems. In this section of the Notice we will attempt to determine the extent to which we can reasonably expect state and local public

safety agencies to migrate to more efficient wireless communications systems. For example, agencies will be asked to evaluate their ability to finance such a migration.

Agencies will also be asked to identify the specific geographic area in which they need to operate their wireless communications systems, identify those other agencies with whom they need to communicate, and evaluate the feasibility of establishing and sharing a multi-agency wireless communications system. These questions will help the Commission determine what further steps we must take to support the need for interoperability among various state and local public safety agencies.

The second area on which the data collection proceeding will focus is the need for additional spectrum to meet needs anticipated through the year 2010. In this section of the Notice, we will solicit input from state and local public safety agencies about their anticipated needs and the extent to which these needs can best be met with additional spectrum. For example, agencies will be asked to divide their projected needs between existing voice and relatively slow-rate data communication and needs for services such as high-speed data and full-motion video.

Agencies will also be asked to identify the assumptions they make to estimate future spectrum requirements. These assumptions should cover areas such as projected population growth in their areas, the crime rate, their financial resources, and the cost tradeoff between implementing more efficient technologies and obtaining additional spectrum. The data collected from this portion of the Notice should help us identify not only how much spectrum may be needed, but also the most desirable frequency band or bands. It should also provide enough information to enable us to determine whether another nationwide allocation is needed or whether spectrum needs are more localized in specific highly congested geographic areas.

B. Public Safety Liaison Officer

PSCC suggests in its comments that the Commission establish an Office of Public Safety.[61] PSCC states that this new Office would be an expert proponent of the public safety services to accumulate and organize public safety positions and disseminate them to other Commission staff and other Federal agencies, while at the same time conveying to the public safety community the Commission's positions on matters affecting the community. In response to this suggestion, the Wireless Telecommunications Bureau has recently appointed a Public Safety Liaison Officer to work with the public safety community, including APCO Project 25, and other concerned Federal agencies on matters affecting public safety communications needs. Among other things, the Public Safety Liaison Officer will solicit

[61] PSCC Comments at pages 8-9.

informal comments on potential improvements to the public safety communications licensing process, such as allowing frequency coordinators or regional planners to take over the responsibility of assigning frequencies to the public safety agencies. The establishment of an advisory committee to oversee the public safety licensing function will also be considered.

C. Options for Efficient Spectrum Use

1. Technical Options

There are a number of technical options available, based on existing and emerging technologies, that should provide public safety agencies with more reliable and sophisticated wireless communications systems. These technical options -- refarming, digital technologies/access techniques, and sectored antenna systems -- are discussed below.

a. *Refarming Proceeding*

As discussed in Section II of this Report, pending refarming proposals include plans to adopt a spectrum efficiency standard based on narrow channel bandwidths; to encourage and to facilitate technical flexibility; to reduce maximum allowable power levels and antenna heights; and to allow trunking in bands below 800 MHz.[62] If adopted, the spectrum efficiency standard proposed would lead to an eventual doubling or even tripling of the current communications channels by migrating from 25 kHz channel bandwidth to 12.5 kHz, 6.25 kHz and 5 kHz channel bandwidths. In addition, the proposal to permit trunking on existing public safety channels in the bands below 512 MHz could result in at least a tripling of the present communications capacity.[63] Finally, the proposal to restrict more tightly system coverage to the smallest possible geographic area should enable more public safety agencies to obtain licenses.

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[62] Our rules governing use of the 800 MHz band channels allocated for public safety already provide for substantial technical and operational flexibility. Not only may licensees use trunking to enhance the use of these channels, but they may also operate with a variety of bandwidths and modulation techniques as long as they do not exceed the prescribed emission mask for their authorized bandwidth. For example, a licensee could use a digital access technique like TDMA or CDMA to significantly increase the communications capacity of their radio channels. Alternatively, they could increase their communications capacity by creating several narrowband channels out of each existing 25 kHz channel.

[63] See NTIA Report 94-311, "A Survey of Relative Spectrum Efficiency of Mobile Voice Communication Systems," July 1994.

b. *Digital Technologies/Access Techniques*

Digital voice systems are rapidly being deployed in mobile services such as SMRs and cellular. Radios that operate on 12.5 kHz channels and use digital technology are becoming available for public safety applications. Two promising digital technologies are currently available, Time Division Multiple Access (TDMA) and Code Division Multiple Access (CDMA). The cellular industry has adopted a standard for each of these technologies and enhanced SMR systems have deployed TDMA systems in several major markets. TDMA is a technology that increases the number of communications channels by dividing each available channel pair into multiple time slots. The TDMA system being used by many cellular licensees splits the 30 kHz channel into three time slots, potentially enabling as many as three users to share the channel at any one time. The TDMA system being implemented by enhanced SMR licensees splits the 25 kHz channel into six time slots, potentially enabling as many as six users to share the channel at any one time. Besides increasing capacity, TDMA has the advantage of allowing complete privacy through digital encryption, as well as facilitating access to advanced digital data services.

CDMA is a technology that employs spread spectrum modulation techniques and coding schemes to permit many separate communications to share a single wideband communications channel. With CDMA, each radio transmission is spread over a large band of spectrum at relatively low power. Each transmission is uniquely coded so that CDMA receivers can extract the correct message. The wider the communications channel the greater the advantages of CDMA in increasing communications capacity. The current cellular CDMA standard specifies a 1.25 megahertz channel scheme. CDMA systems being used in cellular systems have the potential to provide 7 to 10 times the capacity of existing analog systems. CDMA has a theoretical potential to provide up to 20 times the capacity of current analog systems. Both TDMA and CDMA technologies continue to develop and are becoming more robust and reliable. These technologies could be employed to increase the communications capacity of wireless public safety communication systems significantly.

As discussed above in Section II (D) (3), APCO Project 25 is developing standards for the use of digital technology in the public safety radio services. The digital standards being developed by APCO Project 25 could, among other things, ultimately provide for interoperability among public safety agencies using digital technology, and encryption for secure communications.

We anticipate that the efficiency and operational advantages of digital technology will contribute significantly to the ability of public safety agencies to meet their wireless communications needs.

c. *Sectored Antenna Systems*

Cellular and enhanced SMR licensees routinely use sectored antenna systems to expand the capacity of their current channels. This technology uses phased antenna arrays to divide the base station coverage area into three independent 120° sectors or even smaller 60° sectors. Each sector has an individual dedicated antenna array that receives and transmits communications only within its sector. The overall antenna system is designed to prevent interference and overlap from adjacent sectors. By employing a 120° sectored antenna system the capacity of the system is increased by a factor of three. Adoption of this technology by public safety licensees could increase the capacity of these systems as well.

2. Economic Options

Historically, forecasting demand for spectrum has been extremely problematic. Most licensees have not paid for spectrum and, therefore, do not experience the full costs associated with using that spectrum.[64] If a licensee has a choice between spending $1 million for a new radio system or $2 million for a system with equivalent features that uses one-third as much spectrum, it clearly would choose the less expensive system as long as it could freely obtain access to the necessary spectrum. The result is that many users may not be motivated to utilize spectrum efficiently.

The Commission clearly recognizes that the public safety community has certain unique characteristics that distinguish it from other users of the electromagnetic spectrum. First, public safety entities typically must satisfy clearly defined public interest obligations and do not seek to maximize profits. Second, state and local public safety radio users have significant requirements for immediate channel access because of their primary responsibility to protect life and property. Finally, public safety radio users typically face a much longer planning cycle to acquire new systems with public funding, as compared to other non-Federal radio users.

These factors may conflict with the Commission's responsibility to ensure efficient spectrum use, particularly when increased spending may be required to improve spectrum efficiency. In light of these distinguishing characteristics, we recognize that public safety radio users need certain concessions to make sure they can satisfy their radio communications requirements. For example, over the years the Commission has attempted to satisfy public safety needs by allocating additional spectrum and by providing public safety licensees with additional time to plan and implement new radio systems. However, as unoccupied spectrum becomes more valuable, and as demand for a broad array of wireless communications

[64] Licensees of cellular, SMR, and paging systems that have been purchased on the secondary market are notable exceptions.

services rapidly grows, it is clear that it will be increasingly difficult for the Commission to allocate or reallocate spectrum to satisfy expanding spectrum needs of existing users while at the same time satisfying the needs of new users and services.

There are several ways in which economic incentives can be used to encourage state and local public safety agencies to seek more spectrum efficient means of satisfying their growing wireless communications requirements. Four options are discussed below -- greater use of commercial service providers; providing exclusive rights to spectrum space; allowing the leasing of excess public safety spectrum capacity for other wireless services; and allocating spectrum to public safety use on an exclusive basis only for spectrum efficient technologies.

a. *Use of Commercial Service Providers*

One option to reduce the demand of state and local public safety agencies for dedicated spectrum is to encourage greater use of current and future commercial wireless radio systems by providing commercial operators with incentives to provide public safety agencies with priority access. For example, the Commission could offer new PCS licensees the option to obtain additional blocks of spectrum, either free or at a significant discount from their true market value. In return, the PCS licensee would commit to provide service to public safety agencies in its market area. This service would have to be tailored to meet all the requirements of public safety agencies such as priority access and the ability to stay on the air at all times.

Such an approach may provide a viable wireless communications option for many public safety agencies throughout the country. It would enable them to use a cutting-edge technology, obtain relatively inexpensive radios, and have access to a very costly and sophisticated wireless communications infrastructure that in all likelihood they could not afford to implement on their own. In addition, if service were obtained from a PCS licensee, the public safety agency would generally have wireless communications access over a wide geographic area. As more users migrated to PCS systems, interoperability problems would be reduced as such users could easily communicate with each other, given compatible system technologies.

b. *Exclusivity*

Exclusivity is another option by which the Commission could create economic incentives for licensees of this spectrum to use their assigned channels more efficiently. By this mechanism, licensees of systems of a specified minimum size would be able to apply to the Commission to stop licensing new users on their channels, and thereby create a more stable and predictable operating environment. We anticipate that licensees would then be able to rely on exclusive channel use to make mutually beneficial arrangements with co-channel

licensees in their geographic area. These arrangements could include such things as establishing a new radio system that all current licensees could use, or dividing the channel into several smaller channels that could be used on an exclusive basis by each of the current licensees. Our experience with exclusive channel assignments in the 800 and 900 MHz private land mobile bands and in the Cellular Radio Service suggests that, with the appropriate incentives like exclusive use and technical and operational flexibility, public safety licensees with exclusive channel assignments would be likely to make more intensive use of the increasingly scarce spectrum resources in the bands below 470 MHz.

c. *Leasing of Excess Public Safety Spectrum Capacity*

In addition to granting exclusive licenses for public safety spectrum, we may want to consider allowing licensees to lease excess capacity on their systems for other wireless services. Revenue from leasing could be used to offset the cost of implementing more efficient technology in currently allocated spectrum. Also, by permitting the leasing of public safety spectrum capacity for other uses, any concern about the opportunity cost of additional public safety allocations would be reduced. This, in turn, would reduce the need for detailed spectrum requirements projections and justifications for such allocations. This option may be particularly attractive if combined with the option, discussed below, in which public safety spectrum would be licensed in blocks to the states.

d. *New Spectrum Allocations*

Although we do not at this time have the information necessary to initiate a nationwide allocation proceeding for additional public safety spectrum, we would consider an allocation for the express purpose of encouraging more efficient spectrum use. The Commission recognizes that any migration of public safety radio users to new, more efficient technologies will take many years to accomplish, both because of the significant number of licensees on current public safety channels, and because of the need to provide sufficient time for licensees to amortize equipment purchased prior to any rule changes. One way to help speed up the introduction and implementation of new, more efficient technologies would be to make available a band of vacant spectrum that could be used for such technologies. Such a band would be reserved for public safety licensees that will use technologies that meet or exceed a Commission spectrum efficiency standard. Licensees would be given exclusive rights to use their assigned channel(s) as an incentive to invest in new equipment. The reservation of such a band for innovative technologies should encourage and accelerate the introduction of new, more efficient radio equipment. It should also make it easier for public safety agencies that may be operating under severe spectrum constraints to migrate to the new band under a transition that they themselves determine.

The obvious difficulty in implementing such an approach is that there is no spectrum controlled by the Commission that is both available for allocation and adjacent to or quite

close to existing public safety radio bands. Nevertheless, if there is sufficient interest in this option by the public safety community, the Commission will work with NTIA to attempt to identify spectrum that could be shared by NTIA and the Commission.

3. Regulatory Options

There are several options to help meet public safety's wireless communications needs through the year 2010 that require structural changes in Commission regulation of the Public Safety Radio Services. These options -- consolidating the six public safety services into broader service pools; increasing federal/non-federal spectrum and system sharing; and increasing the role of the states in planning and managing spectrum use, are discussed below.

a. *Consolidation of Smaller Services into Broader Service Pools*

One option for helping meet public safety wireless communications needs is to consolidate many of the smaller radio services into broader service pools. With respect to the Public Safety and Special Emergency Radio Services, we could, for example, consolidate the six component radio services into a single Public Safety Radio Service. The rationale for this proposal is two-fold. First, in its allocations of 800 and 900 MHz spectrum for land mobile services, the Commission used broad service pools, including one in which all agencies eligible in the public safety and special emergency radio services could obtain licenses. This approach has successfully blended eligible public safety service entities into common pools of frequencies.

Second, the number of channels allocated to each radio service may not reflect the current demand for radio channels by a particular category of public safety agencies. Most spectrum allocations to the individual public safety services were made over 25 years ago. Typically, the size of the allocations to each service was a function of the perceived relative importance of that service at the time of the spectrum allotment. Although we have implemented rules to permit applicants to be licensed to use channels in a radio service for which they are not eligible, a more flexible approach involving broader eligibility pools may be a preferable solution. Our favorable experience with such pools in the 470-512 MHz and 800 MHz bands certainly argues for strong consideration of such an approach. Although the radio service consolidation proposal has received mixed reviews in the refarming comments, there is wide support for at least some level of consolidation. A consolidated Public Safety Radio Service pool should help ensure that all public safety agencies have equal access to available public safety radio channels.

b. *Federal/Non-Federal Sharing*

An alternative to additional allocations for public safety wireless communications services would be spectrum and/or system sharing among Federal, state and local public

safety entities. The functions of many Federal, state and local public safety services are similar. Examples of similar services include law enforcement, fire protection, and rescue services. Indeed, in emergency situations such as natural disasters, Federal and non-Federal public safety groups work side-by-side, often using identical equipment. These types of joint activities could be enhanced through the use of common wireless communications spectrum or systems. In fact, this type of sharing has already been proposed in a report accompanying the National Performance Review that proposed the establishment of a National Law Enforcement/Public Safety Wireless Network.[65] This new network would enable Federal, state and local officials to communicate with each other over tactical mobile radio systems to share resources and better coordinate investigations. Also, the Federal Law Enforcement Wireless Users Group (FLEWUG), a joint Treasury-Justice Department initiative, has been formed to study interoperability problems and other obstacles to developing such a network.[66]

A likely use of such a network would be access by Federal, state, and local law enforcement groups to the National Crime Information Center's NCIC 2000, a system that will, for example, enable instantaneous fingerprint identification and transmission of stolen property descriptions. APCO has estimated that 75 megahertz of spectrum will be required to implement new wideband technologies, like access to NCIC 2000. We believe that all law enforcement agencies should use the same frequencies to implement future systems that require significantly wider bandwidths than traditional voice and low-speed data systems. Spectrum to implement such wideband wireless communications systems might be found within the spectrum to be transferred by NTIA to private sector use or in other spectrum found suitable for Federal and non-Federal sharing. This approach should have the dual benefits of conserving scarce spectrum while promoting cooperation and coordination among Federal, state, and local public safety agencies, thus enhancing the ability of all public safety agencies to meet their obligations to the American public.

c. *Increased State Role in Spectrum Planning*

Another means of increasing access to spectrum is to encourage public safety agencies in the same or neighboring geographic areas to develop consolidated wireless communications systems. For example, many small agencies that could not individually purchase a sophisticated and spectrum efficient trunked radio system could combine their resources to jointly purchase and implement a trunked system. This type of cooperation was encouraged by the Commission in the Report and Order in Gen. Docket No. 87-112 (3 FCC Rcd 905 (1987) at para. 51), the proceeding that implemented a National Public Safety Plan. In response to this encouragement, a growing number of public safety agencies have invested

[65] Office of the Vice President, *Reengineering Through Information Technology, Accompanying Report of the National Performance Review*, Sept. 1993, at 31-34.

[66] L. Corbin, "Wireless Wonders," *Government Executive*, Oct. 1994, at 61.

considerable time and money to develop wide-area multi-agency trunked public safety radio systems.[67] We will continue to encourage all public safety agencies to consider this option to help them better meet their wireless communications requirements.

Although voluntary cooperation among public safety agencies to create larger consolidated radio systems has been increasing, the Commission may need to take a more active role in this process by changing the way it assigns radio channels to public safety agencies. One approach would be to assign all the channels within the existing Public Safety, Special Emergency and Emergency Medical Radio Services to each state. Under such a licensing scheme, no additional licenses would be granted by the Commission to individual public safety agencies.[68] Each state would then be able to act as the public safety spectrum manager and work to get the maximum communications capacity out of the limited spectrum resource available.

With the exception of the Emergency Medical Radio Service, current Commission rules for public safety services do not recognize any role for state governments distinct from the role of state and local agencies as radio users.[69] Greater state participation in public safety spectrum management could have several benefits from the Federal and state perspective. It could promote autonomous decision-making by state and local governments on questions of their day-to-day operation. Such a licensing approach would enable the public safety users closest to the specific communications problems being faced, to develop and implement solutions to those problems. Another benefit is that it should facilitate interoperability and coordination among the various public safety agencies within each state.[70] Well-coordinated state-wide systems could be developed to efficiently and effectively meet a broad range of wireless communications needs. This licensing approach could also help ensure that the spectrum allocated to the Public Safety Radio Services is used as efficiently and effectively as possible by providing state and local authorities greater latitude to implement spectrum saving technologies. Finally, this approach should give state and local public safety agencies easier access to spectrum necessary for system architecture redesign, while still accommodating current needs.

A potential problem with this approach is that some local communications needs could be subordinated to state needs. Even though this approach would give local governments less

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[67] For example, state-wide trunked radio systems have been implemented in Arkansas and Utah.

[68] All existing public safety licensees would be grandfathered under such an approach.

[69] *See* § 90.27(a), 47 CFR § 90.27(a).

[70] We would also encourage states to work cooperatively to resolve any interstate coordination problems.

control over access to the radio spectrum, we believe that, on balance, it could improve use of scarce public safety spectrum as the state determines how this spectrum should be used to best protect the lives and property within the state.

Although increased state participation in spectrum management could provide many benefits, there are many complex issues to be addressed before the Commission could proceed with this concept. Changes that may be required in the current Rules and in the Communications Act of 1934 concerning spectrum management roles and other legal constraints would have to be studied. The public costs and benefits in terms of service quality and other important considerations would also have to be studied before proceeding with this concept.

As this section demonstrates, there is a wide range of possible options to ensure that the public safety community has adequate wireless communications capacity. Implementation of these options could increase current public safety wireless communications capacity dramatically. Many of the options presented here are already available to the public safety user community. Therefore, if public safety agencies can improve their wireless communications systems by adopting options now available to them, they should do so. They should also carefully review the other options presented. As part of the data collection proceeding discussed in Section IV(A) of this report, we will solicit public comment on this report to assist the Commission to identify those options that it should pursue.

D. Other Actions

In addition to initiating the data collection proceeding discussed in Part A of this Section and pursuing the options discussed in Part B of this Section, we propose to take the following specific short-term and long-term actions to ensure that spectrum allocated for public safety is sufficient to serve the public interest through 2010.

- The Federal Government is to release to the private sector 200 megahertz of spectrum over the next 15 years.[71] On February 10, 1994, the Department of Commerce released its report making a preliminary identification of spectrum for reallocation.[72] In response, the Commission prepared a Report[73] that, among other things, made an alternative proposal to

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[71] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6001(a)(3), 107 Stat. 312 (approved Aug. 10, 1993).

[72] *See Preliminary Spectrum Reallocation Report*, U.S. Department of Commerce, NTIA Special Publication 94-17, Feb. 1994.

[73] *See* Report to Ronald H. Brown, Secretary, U.S. Department of Commerce, Regarding the Preli[illegible] Spectrum Reallocation Report, FCC 94-213, Aug. 9, 1994.

release the 380-400 MHz for private sector use. The ultimate availability of this spectrum will depend on Department of Defense agreement. If this spectrum becomes available for private sector use, because of its proximity to the frequencies already used by public safety, it would be a candidate for allocation to public safety services if a spectrum allocation is deemed necessary.[74]

- The Commission will continue to handle critical spectrum shortages on a case-by-case basis. Public safety entities have always had the option to petition the Commission to use, on a local basis, spectrum that is allocated for other services. For example, the Commission is currently considering a request by public safety users in the New York City area to share use of UHF television channels 16 or 19 to provide spectrum relief to a variety of public safety entities that operate in that area.[75] A similar request was granted in 1985 to the Los Angeles County Sheriff's Department to operate a 55 duplex channel system in the 470-512 MHz band by sharing with UHF-TV Channel 16.[76] These public safety agencies had to demonstrate in detail why the only solution to their wireless communications problems was to be authorized to use additional spectrum. Any future public safety allocations made to specific geographic areas will likely include minimum spectrum efficiency requirements that could be met, for example, by trunking or other efficiency enhancing technologies. The Commission will expedite review and action in these cases.

- The Commission will continue to work with NTIA and other interested parties to determine the extent to which sharing of Federal and non-Federal spectrum is feasible. As mentioned above, sharing appears to be a promising solution to the problem of finding a large portion of spectrum for new wideband technologies. Also, sharing of spectrum for conventional voice and data services may prove to be viable for certain joint operations, for example, disaster relief and drug enforcement.

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[74] Portions of the 380-400 MHz band have been identified by the mobile-satellite industry for its use. In its Second Notice of Inquiry (Second NOI), in IC Docket No. 94-31, adopted January 30, 1995, the Commission seeks comment on a recommendation by the World Radiocommunication Conference Industry Advisory Committee (WRC-95 IAC) that the 387-390 MHz and the 390-399.9 MHz bands be reallocated for space-to-Earth and Earth-to-space operations. *See* Second NOI at para. 55.

[75] *See* Request for Waiver filed April 6, 1992, Supplement to Request for Waiver of Parts 2 and 90 of the Commission's Rules filed April 14, 1994, and Conditional Waiver Request filed November 21, 1994 by New York City Public Safety Agencies.

[76] *See* GEN Docket No. 84-902, Report and Order, 51 FR 04352, FCC No. 85-641, Dec. 10, 1985.

V. ADMINISTRATIVE MATTERS

This Report is issued pursuant to authority contained in Section 6002(j)(10)(B)(iv) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, and Sections 4(i) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 403.

It is ORDERED that the Secretary shall send copies of this Report to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

APPENDIX

Private Radio Bureau Letters To APCO and PSCC

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

APR 4 1994

IN REPLY REFER TO:

7330-01/1700A3

Ronnie Rand, Executive Director
Association of Public-Safety
Communications Officials
International, Inc.
2040 South Ridgewood Avenue
South Daytona, Florida 32119-8337

Dear Mr. Rand:

I am writing to you to formally request APCO's assistance in the Commission's analysis of public safety spectrum needs through the year 2010, mandated last August in the Omnibus Budget Reconciliation Act of 1993. My staff has developed a tentative outline for the final report and has identified specific areas where input from the public safety community would be particularly useful. The specific areas on which we would appreciate your input are as follows: (1) review licensing data by band and geographic area and compare where we are now to where we thought we would be based on the 1985 Docket 84-232 projections of future public safety licensing and spectrum needs; (2) identify factors, such as increases in population, increased mobility, more crime, and new services like mobile video and IVHS, that may affect future needs; (3) develop spectrum needs projections to the year 2010, by area and band, based on historical data and identified growth factors; and (4) discuss the potential to increase the channel capacity of existing allocations from refarming as a result of increased technical flexibility and more stringent spectrum efficiency standards. We encourage you to provide information to the Commission on these areas or any area that you think may be useful to complete this important project. In addition to input about spectrum needs, we hope you will be able to provide specific detailed suggestions on the approach we should take to develop the required public safety plan and on how this new plan should relate to the current planning process for 800 MHz public safety spectrum.

In addition to APCO, we are soliciting input from the Public Safety Communications Council and NTIA. In order for the Commission to meet the February, 1995 deadline to submit a report to Congress on public safety spectrum needs and a plan to satisfy those needs, we must move quickly to collect, analyze, and assemble all pertinent information. You should be aware that our schedule for this project must include time to permit public comment on any input from the public safety community. Therefore, we are asking that you provide whatever information you wish to contribute to this effort no later than July 29, 1994.

I understand that APCO has already convened a committee to work on this project, chaired by Ross Morris. I look forward to working with APCO and the rest of the public safety community to successfully complete this important undertaking. If you or Mr. Morris have any specific questions about this request, please do not hesitate to contact me at (202) 632-6940, or Joe Levin, Chief of the Policy & Planning Branch at (202) 632-6497. Thanks for your cooperation.

Sincerely,

/s/

Ralph A. Haller
Chief, Private Radio Bureau

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

APR 4 1994

IN REPLY REFER TO:

7330-01/1700A3

Mr. Larry Miller
American Association of State Highway
and Transportation Officials
444 North Capitol Street, N.W.
Washington, D.C. 20001

Dear Mr. Miller:

I am writing to you in your capacity as Chairman of the Public Safety Communications Council to formally request PSCC's assistance in the Commission's analysis of public safety spectrum needs through the year 2010, mandated last August in the Omnibus Budget Reconciliation Act of 1993. My staff has developed a tentative outline for the final report and has identified specific areas where input from the public safety community would be particularly useful. The specific areas on which we would appreciate your input are as follows: (1) review licensing data by band and geographic area and compare where we are now to where we thought we would be based on the 1985 Docket 84-232 projections of future public safety licensing and spectrum needs; (2) identify factors, such as increases in population, increased mobility, more crime, and new services like mobile video and IVHS, that may affect future needs; (3) develop spectrum needs projections to the year 2010, by area and band, based on historical data and identified growth factors; and (4) discuss the potential to increase the channel capacity of existing allocations from refarming as a result of increased technical flexibility and more stringent spectrum efficiency standards. We encourage you to provide information to the Commission on these areas or any area that you think may be useful to complete this important project. In addition to input about spectrum needs, we hope you will be able to provide specific detailed suggestions on the approach we should take to develop the required public safety plan and on how this new plan should relate to the current planning process for 800 MHz public safety spectrum.

In addition to PSCC, we are soliciting input from APCO and NTIA. In order for the Commission to meet the February, 1995 deadline to submit a report to Congress on public safety spectrum needs and a plan to satisfy those needs, we must move quickly to collect, analyze, and assemble all pertinent information. You should be aware that our schedule for this project must include time to permit public comment on any input from the public safety community. Therefore, we are asking that you provide whatever information you wish to contribute to this effort no later than July 29, 1994.

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Sincerely,

/S/

Ralph A. Haller
Chief, Private Radio Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-53

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 Released: February 17, 1995

Comment Date: March 28, 1995
Reply Comment Date: April 28, 1995

By the Commission: Commissioners Quello and Ness issuing separate statements.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking proposes new policies governing the participation of foreign carriers in the U.S. international telecommunications market. In this Notice, we set out three goals of our regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets. We consider how to achieve these goals through implementation of Sections 214 and 310 of the Communications Act, as amended ("the Act"). We find that allowing foreign carrier entry into the U.S. international services market will further the public interest by providing additional competition that will benefit consumers. We tentatively conclude, however, that unrestricted foreign carrier facilities-based entry is not in the public interest when U.S. carriers do not have effective opportunities to compete in the provision of services and facilities in the foreign carrier's primary markets.

2. We propose to modify our public interest standard for considering foreign carrier applications under Section 214 of the Act to enter the U.S. market to provide international facilities-based services. We seek comment on requiring as an important element of our public interest standard a demonstration that effective market access is, or will soon be, available to U.S. carriers seeking to provide basic, international telecommunications facilities-based services in the primary markets served by the carrier desiring entry. We also would continue to consider other factors as part of our public interest analysis, such as national security, the openness of other telecommunications segments of the foreign carrier's primary markets, and the ability and incentives of the foreign carrier to discriminate against unaffiliated U.S. carriers.

3. In addition, this Notice proposes a specified level of foreign carrier ownership in a U.S. carrier at which the proposed entry standard would apply. We ask whether it is desirable to consider an applicant to be "affiliated" with a foreign carrier for purposes of our new rules when the foreign carrier acquires an ownership interest of a certain minimum level or a controlling interest at any level. We request comment on whether the minimum level of ownership should be set at greater than ten percent, twenty-five percent, or some other level of the capital stock of the applicant. This Notice also clarifies the definition of a facilities-based carrier.

4. Finally, this Notice asks whether the goals of this proceeding would be served by incorporating the proposed effective market access test as an element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest of more than 25 percent in U.S. radio licensees. Thus, the Notice asks whether our evaluation of the public interest should consider whether the primary markets of the foreign entity offer effective market access to U.S. licensees to provide the same type of radio-based services as requested in the United States. We also seek comment on other public interest factors we should consider.

5. We seek public comment on whether these proposals are administratively feasible and whether these approaches or other alternatives will best serve our goals.

II. BACKGROUND

A. Petitions for Rulemaking

1. AT&T's Petition

6. AT&T filed a petition for rulemaking on September 22, 1993, requesting that the Commission institute a rulemaking to: (1) comprehensively review the issues arising from foreign carrier participation in the U.S. telecommunications market; and (2) promulgate rules that address "the current regulatory dichotomy between the United States and foreign countries."[1] AT&T states that the international telecommunications industry is changing from a bilateral services model to a global market, where customers are demanding "seamless" international networks. It argues that U.S. carriers must obtain comparable market access abroad to compete effectively in the provision of basic interexchange and international services. Likewise, it says, foreign carriers wishing to become global are compelled to gain entry to the U.S. market in some manner. According to AT&T, the traditional regulatory concern about "whipsawing" has been

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[1] FCC File No. RM-8355.

overshadowed by the possibility that a foreign monopoly carrier now may be in a position to provide service originating or terminating in the United States and its home country, whereas U.S. competing carriers would not.

7. First, AT&T proposes that, before approving foreign carrier entry into the United States, the Commission should make a finding as to whether comparable opportunities for U.S. carriers to compete in the home markets of the prospective entrants presently are available or will be available within a reasonable period not to exceed two years.[2] Second, AT&T states that the Commission should condition any authorization for entry in the U.S. services market by foreign carriers having the ability to discriminate among U.S. carriers in their home markets on the agreement by the foreign carrier to nonstructural safeguards to minimize the opportunity for such discrimination. AT&T states that, at a minimum, the Commission should require: (1) no exclusive arrangements for the provision of basic or enhanced services; (2) proportionate return of foreign-billed traffic; (3) cost-based accounting rates within 30 days; (4) consent of originating and terminating carriers to refile U.S. originating or terminating traffic; (5) interconnection or distribution arrangements in the foreign country that are available to all U.S. carriers; (6) no special concessions certification; and (7) information received from other U.S. carriers to be protected and not used for the benefit of itself or its U.S. affiliate.

8. Several comments were filed in response to AT&T's petition.[3] Only Sprint supports AT&T's petition. The majority

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[2] AT&T states that a successful comparable market access showing should include the following elements: 1) U.S. carriers can offer substantially similar services under similar conditions in the foreign country as can be offered in the United States; 2) existence of safeguards to prevent cross-subsidization between the monopoly and competitive market segments; 3) equal access available; 4) availability of published, non-discriminatory tariffs for interconnection in the foreign country; 5) portability of telephone numbers; 6) timely and non-discriminatory disclosure of network information; 7) protection of carrier and customer proprietary information; and 8) effective competition actually exists.

[3] Supporting comments were filed by Sprint Communications Co. L.P. (Sprint). The parties expressing some form of opposition to AT&T's petition are ACC Global Corp. (ACC), the British Embassy, British Telecommunications plc (BT), Cable & Wireless, Inc. (C&W), DOMTEL Communications, Inc. (DOMTEL), EMI Communications Corp. (EMI), ENTEL International B.V.I. Corp. (ENTEL-Chile), IDB Communications Group, Inc. (IDB), Teleglobe

of the commenters oppose AT&T's petition, arguing generally that AT&T's proposed rules would require "mirror reciprocity," which the opponents claim would be unrealistic given the varied telecommunications systems. They also argue that existing safeguards, especially those contained in the 1992 International Services Order[4] and the TLD Order[5] are sufficient to protect competition in the U.S. international and interexchange marketplace.[6] They support the Commission's policy of deciding market entry questions on a case-by-case basis, so as to take into consideration specific circumstances in each case.[7]

2. IDB's Petition

9. Issues related to AT&T's petition also were raised in a petition for rulemaking filed by IDB on October 29, 1993.[8] In this petition, IDB asks the Commission to adopt a uniform definition of a facilities-based carrier for purposes of Commission rules and policies governing international common carriers. IDB states that a uniform definition is important to provide carriers with certainty regarding their reporting obligations and their ability to interconnect international private lines to the U.S. public switched network. IDB proposes that we regulate a carrier as a facilities-based carrier when it obtains the maximum interest in the underlying facility permitted by law. AT&T filed comments against IDB's petition, saying there is a clear definition which need not be changed. MFS International, Inc. (MFS) supports IDB's petition. Because the issues involved in adopting such a definition directly relate to how we regulate U.S. international carriers, we will address IDB's petition in this rulemaking.

Inc. (Teleglobe), Telefonica Larga Distancia de Puerto Rico, Inc. (TLD), Coalition of International Communications Users (International Telecom Users), MCI Telecommunications Corp. (MCI), and Motor-Columbus AG (Motor-Columbus).

[4] Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992)(International Services).

[5] Telefonica Larga Distancia de Puerto Rico, 8 FCC Rcd 106, 111-113 (1992)(TLD Order).

[6] See MCI Comments at 5; TLD Comments at 5-6; C&W Comments at 6-7, 9-11, 13; ENTEL-Chile Comments at 2-3, 8-9; IDB Comments at 4-5.

[7] See ENTEL-Chile Comments at 7, and ACC Comments at 2-3.

[8] FCC File No. RM-8392.

B. Existing Policy Under Section 214

10. We currently examine applications filed by foreign carriers or their U.S. affiliates (collectively "foreign carriers") for international Section 214 authority on a case-by-case basis. We balance our policy in favor of open market entry against the potential for undue discrimination by the foreign parent against unaffiliated U.S. carriers. Under this policy, we have authorized foreign carriers to resell international switched services,[9] non-interconnected private line services, and private line services interconnected to the public switched network ("PSN") upon a determination that the foreign country on the other end of the circuit provides equivalent opportunities to U.S. carriers to resell interconnected private lines.[10] In addition, we recently authorized several foreign carriers to acquire U.S. international facilities subject to safeguards to protect U.S. carriers providing international service from discrimination.[11]

11. In recent years, we have addressed the issues raised by foreign carrier market entry in several significant cases. In 1991, we authorized Atlantic Tele-Network, Inc. (ATN), a 100 percent U.S.-owned carrier, to provide facilities-based switched service to Guyana, even though ATN indirectly controlled the monopoly service provider in Guyana.[12] To protect against potential discrimination that could arise on the U.S.-Guyana route by virtue of ATN's bottleneck control over Guyana's telecommunications infrastructure, we imposed on ATN the same conditions then placed on international common carriers classified as dominant, foreign-owned carriers, as well as other nondiscrimination safeguards.

12. A year later, we approved the acquisition of Telefonica Larga Distancia de Puerto Rico (TLD), a U.S. domestic and

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[9] See, e.g., Cable & Wireless Communications, Inc., 7 FCC Rcd 6855 (Int. Fac. Div. 1992); BT North America Inc., DA 94-1257, International Bureau, rel. Nov. 14, 1994.

[10] See, e.g., Cable & Wireless, Inc., DA-1344, Tele. Div., rel. Dec. 8, 1994; Cable & Wireless, Inc., DA 94-1227, Tele. Div., rel. Nov. 2, 1994; Cable & Wireless, Inc., 8 FCC Rcd 1664 (Com. Car. Bur. 1993); fONOROLA Corporation and EMI Corporation, 7 FCC Rcd 7312 (1992), Order on Recon., 9 FCC Rcd 4066 (1994).

[11] See infra paras. 12-14.

[12] Atlantic Tele-Network, Inc., 6 FCC Rcd 6529 (1991), appl. for review denied, 8 FCC Rcd 4776 (1993), appeal pending sub nom. Atlantic Tele-Network, Inc. v. FCC, U.S. Court of Appeals, D.C. Circuit, No. 93-1616.

international long distance carrier, by Telefonica de Espana (Telefonica), the government-controlled monopoly carrier of Spain.[13] Because TLD would be controlled by the Spanish telecommunications administration, which exercised bottleneck control over Spain's telecommunications infrastructure, we imposed regulatory safeguards to prevent TLD from acting in concert with Telefonica or other foreign carriers to discriminate against U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic. We noted that, in this particular instance, the potential for anticompetitive harm to U.S. carriers was mitigated by the fact that the applications involved a limited number of circuits; traffic would originate only from Puerto Rico and the U.S. Virgin Islands; and no interconnected private line service would be involved. We also considered the benefit to the Puerto Rico government of the capital generated by the privatization of TLD. However, we said that, with respect to future facilities-based applications from TLD (or any carrier affiliated with a foreign carrier), we would assess whether the authority sought posed an additional risk of anticompetitive behavior, and, if so, whether regulatory safeguards would be sufficient to protect against it.

13. In June 1994, we authorized ENTEL-Chile, a Chilean long distance carrier, to acquire the U.S. carrier AmericaTel.[14] We found that: (1) Chile's market for domestic long distance and international services was increasingly competitive and open to U.S. investment and participation; (2) Chile has increasingly liberalized its telecommunication laws and regulations aimed at promoting competition and preventing discrimination against U.S. and other foreign carriers; and (3) the nondiscrimination safeguards available under Chile's regulatory regime and the safeguards we imposed as a condition of authorization would be sufficient to protect U.S. carriers in their provision of international service between the United States and Chile. We required AmericaTel to submit annual progress reports detailing the status of the telecommunications industry and regulatory regime in Chile and reserved the right to review the terms and conditions of the authorization in the event that the safeguards imposed in the order or by virtue of Chilean regulation failed to sustain competition on the U.S.-Chile route.

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[13] TLD Order, 8 FCC Rcd 106.

[14] AmericaTel Corporation, 9 FCC Rcd 3993 (1994)(AmericaTel Order). At the time of the AmericaTel Order, Telefonica indirectly owned 20 percent of ENTEL-Chile. Telefonica has since divested its interest. See Letter from Raul R. Rodriguez, Counsel to AmericaTel Corporation, to William F. Caton, Acting Secretary, FCC, dated October 31, 1994.

14. Shortly thereafter, we reviewed the British Telecommunications plc (BT) acquisition of a non-controlling interest in MCI as part of a global alliance to provide services to customers worldwide.[15] We found that the terms of the investment did not result in a transfer of control to BT requiring prior FCC approval and that BT's 20 percent investment in MCI, even when combined with other foreign ownership for a total of up to 28 percent foreign ownership in MCI, was permissible under Section 310(b)(4) of the Communications Act. Additionally, we found that MCI's commitments to accept no special concessions and to maintain certain provisioning and maintenance records, combined with the reporting requirements we imposed, adequately protected against the potential for BT to leverage its dominant position in the U.K. telecommunications market to discriminate in favor of MCI over competing U.S. carriers. In so deciding, we took into account the United Kingdom's relatively liberal regulatory regime and the existence of competition in the U.K. domestic telecommunications market.

C. Existing Policy Under Section 310

15. Section 310(b)(4) establishes benchmarks applicable to foreign entities seeking to acquire an ownership interest in the parent company of a U.S. radio licensee. Specifically, Section 310(b)(4) imposes the following benchmarks: 25 percent foreign ownership, 25 percent foreign directors, and no foreign officers. Currently, the Commission examines requests to exceed the Section 310(b)(4) benchmarks on a case-by-case basis, and has generally considered the following factors: national security, the extent of alien participation in the parent holding company, and the nature of the license, including whether the licensee exercises control over content. In addition, the Commission may consider any other public interest factors appropriate.

16. One of Congress' principal reasons for enacting Section 310 of the Communications Act of 1934 was its concern for national security and preventing alien activities against the government during a time of war.[16] Accordingly, the Commission

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[15] BT/MCI Declaratory Ruling, 9 FCC Rcd 3960 (1994)(BT/MCI Order).

[16] See generally S. Rep. No. 781, 73d Cong., 2d Sess. 7 (1934). See also Moving Phones Partnership L.P. v. FCC, 998 F.2d 1051, 1055-56 (D.C. Cir. 1993)(referring to "national security policy underlying section 310(b)" and indicating that "the rationale is equally applicable to common carrier radio stations, as they, also, are a part of the nation's communications network"). The original national security rationale for limiting foreign ownership in a parent corporation has less applicability today than it had in the 1930's. Today there is a plethora of

has traditionally sought to ascertain whether a country with which a prospective licensee or its parent is associated enjoys "close and friendly relations with the United States" and, therefore, is not a "national security concern."[17]

17. The Commission has also traditionally considered the extent of alien participation in the parent corporation of a Title III radio licensee. More specifically, the Commission has considered where the parent corporation is incorporated (the United States or elsewhere); the citizenship of the stockholders, officers and directors of the parent corporation; and whether there are intermediate corporations between the licensee and the parent corporation that are incorporated in the United States, are owned by U.S. citizens or interests, and have U.S. officers and directors.[18]

18. In addition, the Commission has traditionally considered the type of radio license at issue in assessing whether the public interest would be disserved by foreign ownership in a parent corporation exceeding the Section 310(b)(4) benchmarks. For example, the Commission has concluded that concern about the effect of foreign ownership on national security is lessened when common carrier radio licenses are involved because they are "passive" in nature and the licenses confer no control over the content of transmissions.[19]

19. Finally, the Commission may also consider other relevant factors, including the furtherance of established Commission policies such as increased competition or the wide

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service providers. No single licensee which is owned in part by a foreign corporation could take over the wireless or wireline services in the United States in a time of war.

[17] See, e.g., GRC Cablevision, Inc., 47 FCC2d 467, 468 (1974) ("We note . . . that the non-citizens are from a country [Canada] that has traditionally had close and friendly relations with the United States . . . .").

[18] See, e.g., BT/MCI Order, 9 FCC Rcd at 3964, para. 22 (1994).

[19] BT/MCI Order, 9 FCC Rcd at 3964, para. 23; Teleport Transmission Holdings, Inc., 8 FCC Rcd 3063 (Com. Car. Bur. 1993); IDB Communications Group, Inc., 6 FCC Rcd 4652, 4653 (Com. Car. Bur. 1991); Data General Corporation and Digicom, Inc., 2 FCC Rcd 6060 (Dom. Fac. Div. 1987).

dissemination of licenses.[20]

III. DISCUSSION

20. The focus of telecommunications service providers has become increasingly global over the last several years, reflecting the increasingly global nature of the economy. The United States has become the most vital market for shaping world competition -- over 20 percent of all international communications services involve the United States.[21] Most of the major U.S. corporations are now multinational. Over 40 percent of the world's multinational corporations are headquartered in the United States.[22] These commercial customers prefer one-stop shopping to satisfy their varied and specialized communications needs. In addition, the many Americans who travel internationally, or have family or friends in other countries, have an interest in efficient, affordable global telecommunications. International telecommunications service offerings increasingly involve provision of an "end-to-end" package of services, including domestic (in two or more countries) and traditional international services. Both U.S. and foreign telecommunications service providers are developing strategies to serve their customers' needs through alliances with other service providers and entry into foreign international and domestic markets.

21. Our procompetitive U.S. regulatory policy has permitted a number of foreign carriers to enter the U.S. international and domestic services market to meet customer demands. Many other countries permit various forms of entry into their markets by foreign-based carriers, including many U.S. telecommunications providers. When such entry has been accompanied by regulatory liberalization, countries allowing entry already are experiencing the benefits of competition. We believe both the carriers and the consumers of those countries with liberalized entry policies should receive the benefits of having their carriers compete in the lucrative U.S. market.

22. But many important foreign communications services and facilities markets or market segments remain closed to U.S.

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[20] See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 2348, 2349, para. 4 (1994) (In which Commission announced policy of promoting competition among a diverse group of service providers).

[21] See ITU Direction of Traffic: International Telephone Traffic, 1994, p.7, Table 2.2; TeleGeography 1, 85 (G. Staple ed. 1993).

[22] Telecommunications Reports, Oct. 10, 1994, at 17.

competition, even while entities from those markets have entered or seek to enter similar U.S. markets.[23] As detailed below, asymmetric market access is detrimental to both U.S. service providers and U.S. consumers. Closed foreign markets preserve the market power of foreign entities in their home markets and closed markets may inhibit competition in the provision of global communications services.[24]

23. Under these circumstances, current policies based on the traditional correspondent services model[25] may not adequately address questions of market access, undue discrimination and potential anticompetitive effects that arise in today's evolving telecommunications markets, where carriers seek entry on both ends of international circuits. Further, our case-by-case review of foreign carrier applications has caused uncertainty in the market due to the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power in their home markets. Moreover, there is a risk that case-by-case determinations of the public interest may inadvertently underemphasize the general global interest of the United States in promoting a competitive world market.

24. In addition, our current approach to considering foreign entry into U.S. radio-based telecommunications and broadcast markets through application of Section 310(b)(4) may not be the most effective means of promoting global competition in these areas. It may be that our decisions in public interest determinations under Section 310(b)(4) should more directly consider how the decision will influence the development of a competitive market for international communications services.

25. We believe a rulemaking proceeding would help the Commission to articulate standards to provide more coherent principles to guide its deliberations concerning individual cases. A formal rulemaking also would give foreign entities more certainty when making investment decisions, and provide an

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[23] For instance, in 1993 the Office of Technology Assessment concluded that 85 percent of the European Union's ("E.U.'s") telecommunications services market remained closed to foreign entities. In the Asia-Pacific region, most countries, including South Korea, Singapore, Malaysia, China, and Japan maintain a monopoly in basic local voice services.

[24] See infra paras. 28-29.

[25] In a traditional correspondent services arrangement, a U.S. carrier enters into an operating agreement with an unaffiliated foreign carrier under which the two companies agree to jointly own and operate international facilities and terminate each other's telecommunications traffic.

incentive for foreign administrations with currently closed markets to consider opening their markets.

A. Commission Goals

26. We have three basic goals in this rulemaking:

1. To promote effective competition in the global market for communications services.

2. To prevent anticompetitive conduct in the provision of international services or facilities.

3. To encourage foreign governments to open their communications markets.

27. The promotion of effective competition in the global market is our primary goal. Such competition will achieve for U.S. consumers reduced rates, increased quality, and new innovative services, including the availability of global communications services. Thus, through this rulemaking, we intend to promote the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. As explained below, the other two goals are necessary to reach this first goal.

28. A necessary step towards obtaining effective competition is the prevention of anticompetitive conduct in the provision of international services or facilities. In a truly competitive global market, entry of foreign carriers into the U.S. international market would be procompetitive. However, because global competition remains highly asymmetric, unrestricted entry by foreign carriers from closed markets into the open U.S. market has the potential to inhibit competition, particularly with respect to the provision of global communications services to high-end users such as multinational companies. For instance, a foreign carrier would be able to acquire 1+ access to U.S. consumers and hold itself out as a ubiquitous provider of U.S. international services while U.S. carriers could not make the same representations in the foreign carrier's home market. In addition, such a carrier would be able to offer its customers benefits such as lower costs and faster provisioning of services provided between its closed markets and the United States.

29. Such conduct by foreign carriers may have anticompetitive effects for several reasons. First, it preserves and maintains a monopoly in the foreign carrier's home market. Second, it allows the foreign entity to use that monopoly to gain a competitive advantage in other markets that are, or could be, competitive, including communications between its foreign home market and the United States, communications in the United

States, and global network services. The foreign competitor has a competitive advantage, and will therefore win customers, not because of its superior business acumen, responsiveness to customers, or technological innovation, but because of its protected status in its home market. The possession of such unmeritorious advantages is a disservice to consumers in all these markets because, in the absence of full competition on the merits by all competitors, consumers do not receive reduced rates, increased quality, and innovation.

30. In general, the potential for exploitation of a foreign carrier's market power is decreased by: (1) access to facilities at both ends of the international connection for all U.S. carriers; and (2) effective competitive safeguards (including interconnection rules) enforced by an appropriate regulatory authority at both ends. Our decision in AmericaTel shows our willingness to accept foreign carrier entry if these two conditions are met. If, however, the foreign carrier is not subject to facilities competition and competitive safeguards, its affiliation with a U.S. carrier or entry into the U.S. market may raise serious competitive questions.

31. Therefore, another key to global competition is foreign market liberalization. It is unlikely competition could thrive if a particular market keeps out some of its most effective global competitors. The demand for seamless global services by business means that U.S. carriers serving the other country must be able to originate traffic from their customers in that country to other markets around the world. Encouraging global competition further means that there needs to be international facilities-based competition on the U.S. and foreign ends of an international route. Open markets permit U.S. carriers to respond to foreign carriers in relevant markets, allowing U.S. carriers to be healthier competitors both at home and abroad. For example, U.S. wireless service providers' participation in foreign countries' cellular markets has strengthened both U.S. and foreign competitors and has resulted in improved service to both foreign and U.S. consumers. Closed markets frustrate all these public interest benefits.

32. Access to the U.S. market through international Section 214 authorizations or Title III licenses may be an appropriate tool to achieve the benefits of competition such as low prices, high quality, and innovation. The benefits U.S. companies would receive by having an outlet for their capital, technology and expertise would be balanced by the same benefits flowing to their foreign counterparts through entry into the U.S. market. Also, access to the U.S. market, as a uniform standard, could be administratively more efficient and less of a burden on the Commission's resources than the drafting of multiple sets of conditions to fit the particular attributes of each foreign market on a case-by-case basis.

33. Therefore, we propose the addition of an effective market entry standard to our public interest analysis of foreign carrier entry applications under Section 214 as a tool to encourage foreign administrations to open their markets to U.S. entities. This, in turn, will eliminate opportunities for foreign entities to engage in conduct that might have anticompetitive effects in the provision of international services or facilities, including undue discrimination or other abuses of bottleneck facilities, and will promote effective global market competition. We also request comment on whether our goals in this proceeding will be furthered by incorporating the effective market access test as an element of our Section 310(b)(4) analysis for Title III common carrier, aeronautical and broadcast license applications.

34. Whatever entry standard we adopt in this proceeding for international Section 214 authorizations will not be an end in itself. It will only be an interim step designed to further the goal of effective competition in the global communications market. Therefore, we expect that, as the trend of liberalization and privatization continues around the world, and more countries permit facilities-based competition for voice and other services, the need for such entry standards will diminish.

B. Section 214 Standard For Entry By Foreign Carriers

1. International Facilities-based Entry By Foreign Carriers

a. Regulated Open Entry Under Section 214

35. Currently our rules do not prohibit foreign-owned or affiliated carriers from acquiring and operating international switched and private line facilities on a common carrier basis in the United States. We have permitted some services by foreign carriers on international routes, including routes where the applicant is affiliated with a foreign carrier. Prior to authorizing entry, we have reviewed the potential effects on competition in the U.S. market. If necessary, we have imposed safeguards to prevent undue discrimination and unfair competition.[26] In our recent facilities-based authorizations to foreign carriers, we found that our nondiscrimination safeguards were sufficient in part either because of the competition and regulation that existed in the foreign carriers' home market, or because the authority granted was limited in scope.

36. We have followed this course to encourage competition

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[26] See TLD Order, 8 FCC Rcd at 109-113.

in the U.S. international services market.[27] Some have questioned, however, whether the benefits of such competition are undermined when new entrants are able to succeed because of privileged access to closed foreign markets.

37. Our experience leads us to believe that an open entry policy, without explicit standards, may not provide sufficient incentive for foreign markets to open. In addition, in light of demands by multinational firms for end-to-end telecommunications services and "one-stop shopping," safeguards may not compensate for the disadvantages U.S. carriers face when competing against a foreign carrier that operates in both the United States and closed foreign markets. The competitive strengths and abilities of individual service providers -- rather than the regulatory structure of markets -- should determine the success of service providers in the global telecommunications market.[28]

b. Effective Market Access

38. We tentatively conclude that we should modify our entry standard for international facilities-based carriers to encourage the formation of a competitive global market. We believe that our standard should permit entry into the U.S. international facilities-based services market by foreign-affiliated carriers where the foreign carriers' markets are open to U.S. carriers. Therefore, we believe that an important element of our proposed public interest test should be effective market access for U.S. carriers in the primary international telecommunications markets served by the carrier desiring entry. This access must exist at the time of entry, or in the near future. We also will consider other factors which we have previously applied under our public interest analysis such as national security; the openness of other telecommunications segments of the foreign carrier's primary market; and the ability and incentive of the foreign carrier to discriminate against unaffiliated U.S. carriers.

39. Initially, we request comment on the scope of this Commission's statutory jurisdiction to consider the availability of effective market access to foreign markets as one factor in

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[27] See TLD Order, 8 FCC Rcd at 108. See also Regulatory Policies and International Telecommunications, CC Docket No. 86-494, Report and Order and Supplemental Notice of Inquiry, 4 FCC Rcd 7387, 7428 (1988)(citing Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022, 1025 (1987)). See also FTC Communications, Inc., 2 FCC Rcd 6114 (1987) (granting switched service facilities-based authorization to U.S. carrier 14.9 percent of which is owned by company held indirectly by the French government).

[28] See AmericaTel, 9 FCC Rcd at 3996, para. 14.

our public interest analyses under Sections 214 and 310(b)(4) of the Act. Under our authority to regulate foreign commerce in communication by wire and radio,[29] we have examined the degree of market openness for the purpose of ensuring the efficacy of our competition safeguards.[30] In order to ensure compliance with our International Settlements Policy, we have also examined the openness of other markets to determine whether equivalent international private line resale opportunities exist.[31] In this Notice, we seek comment on the scope of our jurisdiction to consider the openness of foreign markets to further the three goals described in Section III.A.

40. We propose to define effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the foreign carrier seeking entry. A primary market is one where a carrier has a significant facilities-based presence.[32] We would consider the following factors, none of which would be dispositive, to determine whether effective market access exists: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including costallocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards. In considering these indicators to determine whether effective market access exists, we will not necessarily require that each factor be present in order to make a favorable finding, particularly if there is evidence that the market is fully competitive. Rather, we will look to the arguments of the applicant and commenting

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[29] See Section 1 of the Communications Act of 1934, 47 U.S.C. §151.

[30] See AmericaTel Order, 9 FCC Rcd at 3997-4001; BT/MCI Order, 9 FCC Rcd at 3969.

[31] See ACC Global Corporation, 9 FCC Rcd 6240 (1994); fONOROLA and EMI, 7 FCC Rcd at 7312.

[32] See para. 43, infra.

parties as to the appropriate weight of each factor in a particular market.

41. We do not propose to adopt AT&T's "comparable market access" standard as a method of regulating entry. AT&T would require the Commission to find that competitive opportunities essentially identical to those in the United States are available to U.S. carriers in the home markets of the prospective entrants. Given the varying market and regulatory conditions around the world, it would be impossible to find a situation where essentially identical market access exists. The AT&T test would require that the regulations and market structure of the foreign country mimic those of the United States. Such a strict test would be impossible to meet, and thus would not encourage open markets. We also believe that there are times when public interest factors other than comparable market access might be decisive on the issue of entry. For example, if comparable market access exists for international facilities-based services in a particular country, but all other telecommunications markets are closed to U.S. carriers, the balance of the public interest factors may weigh against granting entry to a carrier from that country. While market entry is an important part of the public interest analysis, we do not share AT&T's view that comparable market access must exist before foreign carrier entry is allowed.

42. We also do not believe it necessary to adopt AT&T's request for cost-based accounting rates as a condition of foreign carrier entry. AT&T proposes that as a prerequisite to entry the foreign carrier should agree that it will within thirty days reduce accounting rates for all U.S. carriers to the lesser of either cost-based levels, or the lowest rate charged by the foreign carrier to other telecommunications entities from any other country. This requirement should not be necessary because we expect accounting rates to drop as a natural consequence of the introduction of effective market access. We propose, however, that the presence of cost-based accounting rates be part of our total public interest analysis to determine whether facilities-based market entry should be allowed.

43. We request comment on the following approach for applying the effective market access element of the public interest test. If a foreign carrier desires to enter the U.S basic international facilities-based market either directly or through affiliation[33] with an authorized U.S. carrier, we would assess whether the primary market, or markets, of the carrier offers effective opportunities to U.S. carriers to compete in the provision of basic, international services and facilities. We recognize that a foreign carrier might operate in several

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[33] See infra Section III.B.2.a. for a discussion of the definition of "affiliation."

geographic markets. Therefore, for this part of the test we will only look at primary markets: those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant. A carrier's secondary market would be defined as a market in which it has an ownership interest in a facilities-based carrier, but is not a substantial or dominant carrier, or where insignificant traffic flows exist between the United States and that country.

44. Under this approach, if a U.S. carrier can compete as a facilities-based provider of international basic services in the primary market(s) of the carrier seeking entry, we would find that the carrier has met the effective market access element of our public interest standard. Where a foreign carrier's primary markets are open, even if secondary markets closed, we would find that the market access element has been met.

45. Once we have reviewed the effective market access element of our public interest analysis, we would assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market. Such factors could include the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; the status of the foreign carrier as a government or non-government entity; the general significance of the proposed entry to promotion of competition in global markets; the presence of cost-based accounting rates; and any national security implications. Finally, we would solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

46. We believe the above approach would be the most effective way to promote both global competition and competition in the provision of U.S. international services, with their associated benefits for users. This approach would, in most cases, limit facilities-based competition by new foreign carrier entrants to those cases that affirmatively promote global competition and encourage the opening of foreign markets. We believe that, in the long run, this approach should result in stronger, more equal competition both in the United States, and abroad, because carriers would not have marketing and provisioning advantages resulting from operating both in closed foreign home markets and in the United States.

47. We also believe this approach addresses our goal of removing opportunities for undue discrimination and other conduct that might have an adverse effect on competition. Linking facilities-based entry to effective market access is the surest means of preventing anticompetitive conduct by a foreign carrier.

If other public interest factors weigh in favor of allowing entry, safeguards such as dominant carrier regulation can still be imposed to guard against undue discrimination and anticompetitive conduct.

48. Further, we believe this approach would be the best method of furthering our goal of encouraging foreign governments to liberalize their telecommunications markets. In this respect, two views were presented in response to AT&T's proposed "comparable market access" test. AT&T contends that foreign governments have no incentive to liberalize if the United States does so unilaterally. AT&T argues that these governments might liberalize if given an incentive, i.e., access to the U.S. market by their carriers. On the other hand, several other carriers have argued that, if the U.S. government increases restrictions on U.S. market access, other governments might retaliate with increased restrictions as well.

49. We believe that our proposed public interest standard addresses both AT&T's concern about providing incentives to open, and the other carriers' concerns about inviting retaliation. By having effective market access as the first element of our public interest standard, we are emphasizing that we will recognize and reward carriers from those markets that are liberalizing. At the same time, we are trying to avoid sending a signal that might be misinterpreted as a closing of our markets. Indeed, this proposed approach, unlike AT&T's, purposely does not require "mirror reciprocity" for this reason. We maintain flexibility under this approach to look at all of the public interest factors surrounding entry, and balance the market conditions of the primary markets to see what opportunities are present for U.S. carriers to compete there.[34] Even if a foreign carrier cannot demonstrate that effective market access exists for U.S. carriers in its primary markets, it may still show that other public interest factors warrant its entry into the U.S. market. Thus, we believe the advantages of this flexible approach would offset any disadvantages that might occur by not allowing immediate facilities-based entry by all foreign carriers. Furthermore, we believe this flexible approach will promote the objectives of the Administration's Global Information Infrastructure (GII)

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[34] For example, the Commission traditionally has not been concerned with content-related issues in authorizing the provision of U.S. international common carrier services. These issues, however, may warrant consideration in our international Section 214 public interest analysis as common carriers seek to enter national and global markets for video and audio programming as well as video and audio transmission.

initiative[35] by encouraging competition.

c. Other Matters

50. We do not believe that our goals would be furthered by requiring an effective market access showing when a U.S. carrier acquires an ownership interest in a foreign carrier. If, however, the foreign carrier acquired by the U.S. carrier is a monopoly, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules, we would regulate the U.S. carrier in the same manner as if the foreign carrier itself had entered the U.S. market. That is, we would apply our dominant carrier and other nondiscrimination safeguards to the U.S. carrier in its provision of U.S. international services.[36]

51. Finally, we propose to implement whatever approach we ultimately adopt in this proceeding through the Section 63.01 application process and the Section 63.11 notification process. Section 63.11 of the rules requires carriers to notify the Commission within ninety days of the acquisition of an "affiliation"[37] with a foreign carrier. We would continue to place these notifications on public notice. We propose, however, to change the notification period specified in Section 63.11 from ninety (90) days to thirty (30) days. In addition to using the notification to determine whether a change in regulatory status may be warranted under Section 63.10, we would also use the notification to determine whether further review of the facts surrounding the acquisition is warranted, and, if so, whether the carrier's Section 214 certificates should be designated for hearing. The carrier also would have the option, prior to the acquisition, of seeking a declaratory ruling that such acquisition serves the public interest, convenience and necessity.

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[35] See Vice President Al Gore, Speech at World Telecommunications Development Conference (Mar. 22, 1994)(transcript available at the Federal Communications Commission). One of the goals outlined by the Vice President in his speech before the World Telecommunications Development Conference was to encourage competition as a means of increasing innovation, reliable service, and economic growth. Vice President Gore also emphasized the importance of a flexible, effective regulatory framework that can help ensure the continued openness of the more liberal foreign telecommunications markets, and promote the opening of closed foreign telecommunications markets to competitive entry.

[36] See infra Section III.C.

[37] See infra Section III.B.2.a. for proposed new definition of "affiliation."

2. Definition of Affiliation

a. Affiliation for Purposes of Entry Authorization

52. We propose to apply any entry standard adopted in this rulemaking for international Section 214 applications only to those potential entrants that are "affiliated" with a "foreign carrier."[38] We tentatively conclude that it is not necessary to include within the scope of this rulemaking those potential entrants with foreign owners that do not fall within the definition of a foreign carrier. This is in contrast to Section 310(b) of the Act, which applies to ownership by any foreign entity. We believe that limiting the scope of this rulemaking to foreign carriers should promote development of effective global competition by providing national and global carriers with the flexibility they need to structure their businesses and raise capital from foreign sources other than foreign carriers,[39] while controlling the potential for abuse of market power by certain foreign carriers. We request comment on this approach, particularly about whether it adequately encourages more open markets abroad.

53. In conjunction with its request that we adopt a comparable market access standard, AT&T argues that we should change our definition of affiliation from a control standard to one that treats a U.S. carrier as an affiliate of a foreign carrier when the foreign carrier owns five percent or more of the

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[38] We propose to define "foreign carrier" as we have defined it in Section 63.01(r)(1)(ii) of the rules: "... any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1." We construe this definition of a foreign carrier as we did in International Services. Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. International Services, 7 FCC Rcd at 7334 n.47.

[39] We also ask infra in Section III.D. whether we should adopt a liberalized application of Section 310(b)(4), as it applies to licensing U.S. common carrier, broadcast and aeronautical radio facilities, which will permit us to recognize foreign countries' efforts to liberalize their telecommunications markets. We note, however, that our discussion regarding identifying foreign carrier affiliations for purposes of authorizing entry under Section 214 is irrelevant for purposes of applying Section 310(b)(4), which is governed by statute.

U.S. carrier.[40] One reason to revise our affiliation standard is that it may not address many of the ways in which foreign carriers seek to serve the U.S. international telecommunications market. For instance, there have been direct acquisitions of U.S. carriers, such as TLD and AmericaTel, joint ventures involving less-than-controlling ownership interests in U.S. carriers, such as the BT/MCI venture, and co-marketing arrangements such as AT&T's WorldPartners Company.

54. We note that, in the International Services proceeding, the Department of Justice (DOJ) commented that a less-than-controlling interest by a foreign carrier in a U.S. carrier could give the foreign carrier the financial incentive to favor its U.S. affiliate. Indeed, DOJ recently alleged in its Complaint in U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO),[41] that the acquisition of 20 percent of MCI shares by BT may substantially lessen competition in the provision of international telecommunications services between the United States and the United Kingdom.[42] DOJ was particularly concerned with the territorial allocation provision and loss of rights provisions entered into between BT and MCI that would force BT to rely upon its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market.[43]

55. In our Declaratory Ruling regarding the BT/MCI venture, we also found that a less-than-controlling interest could be a source of concern.[44] Thus, in spite of the fact that MCI and BT

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[40] For a more detailed discussion of our current definition of affiliate, see infra para. 65.

[41] U.S. v. MCI Communications Corporation and BT Forty-Eight Company (NEWCO), Case No. 1:94 CV01317 (D.D.C. filed June 15, 1994)(hereinafter cited as U.S. v. MCI). DOJ and the defendants (MCI and NEWCO) stipulated to an entry of a Final Judgment.

[42] See DOJ Competitive Impact Statement filed June 15, 1994 in U.S. v. MCI at 10.

[43] See id. at 11.

[44] In particular, we found that BT's 20 percent interest in MCI, the second largest U.S. long distance carrier, coupled with its participation on MCI's Board of Directors, could provide BT with the incentive both to discriminate in favor of MCI and to influence the corporate decisionmaking process of MCI. In addition, we noted that BT and MCI had jointly created NEWCO (now called "Concert") which, at least initially, would develop and market enhanced service products, which could require access to the basic services network controlled by BT in the United Kingdom. Finally, we noted that BT would be forced to rely on

would not be "affiliated" within the meaning of our current rules, we concluded that certain factors created incentives for BT to favor MCI.

56. We believe that the competitive implications of the BT/MCI transaction, and other joint ventures developing, underscore the inappropriateness of using control as a threshold level of foreign ownership at which an entry standard would apply for foreign carriers. While we recognize that some U.S. carriers may need additional capital to compete worldwide, and may benefit from foreign carrier investment, we are concerned that if a foreign carrier acquires even a less-than-controlling ownership interest in a U.S. carrier, this also may confer on the foreign carrier the incentive to discriminate in favor of the U.S. carrier. Although in many such instances the incentive to discriminate may be minimal, our safeguards may not always be sufficient to limit the potential for undue discrimination (and other competitive advantages resulting from the exercise of market power) that could occur when a foreign carrier has an ownership interest in a U.S. international carrier.

57. We therefore tentatively conclude that a new affiliation standard is needed that will identify those instances of foreign carrier investment that may require review to see if they implicate the public interest goals of this proceeding. Accordingly, for the purposes of establishing an entry standard, we propose to adopt a definition of affiliation that includes cases where a foreign carrier acquires a direct or indirect ownership interest of a certain minimum percentage level, or a controlling interest at any level, in a U.S. carrier. We seek comment on what that level of interest should be. In reaching a decision, we will look at what level of ownership may give the foreign carrier the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects. We also are concerned whether the investment may provide the U.S. carrier with other competitive advantages that flow from the exploitation of the foreign affiliate's market power, such as the ability to market its services exclusively in conjunction with those offered by the foreign carrier. Such exclusive arrangements would be of concern at least until we are assured of effective facilities-based competition on the foreign end. We emphasize, however, that whatever minimum level of ownership we adopt is meant only to be a trigger for our entry review, not a bar to entry. As outlined in this Notice, our review will then take into consideration all factors that might weigh in favor of, or against, allowing entry.

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its 20 percent investment in MCI as a primary source of revenues from the U.S. telecommunications market. BT/MCI Order, 9 FCC Rcd at 3967, para. 36.

58. An interest of five percent, as suggested by AT&T, has been found by the Commission to be an appropriate standard of ownership affiliation in other important regulatory areas such as the Telephone Company-Cable Television Cross-Ownership rules.[45] We find, however, that applying an entry standard and competitive safeguards at a five percent investment might unreasonably limit the ability of U.S. carriers to attract foreign investment, and impose unnecessary administrative burdens on potential entrants. We believe that any residual concerns about potential anticompetitive effects at this level of investment can be adequately dealt with through our standard nondiscrimination safeguards that we apply to all U.S. international carriers and through the enforcement process if necessary.

59. A greater than ten percent ownership interest in a U.S. carrier by a foreign carrier may warrant our scrutiny. Analogous precedent from orders issued under the terms of the AT&T Consent Decree and from the Securities and Exchange Commission ("SEC") supports the reasonableness of a ten percent cap. In a blanket waiver granted by the U.S. District Court in United States v. Western Electric Company (AT&T Consent Decree), the Court, with support of the DOJ, permitted the Bell Operating Companies to acquire up to ten percent of foreign telephone companies, subject to certain nondiscrimination conditions. Section 16(a) of the Securities Exchange Act of 1934, as amended ("the Exchange Act"), also is instructive. Section 16(a) provides that an owner of greater than ten percent of the publicly-traded equity securities (other than exempt securities) of a publicly-held company must file periodic ownership reports with the SEC. This level of ownership is thought to give the security holder the position of an insider and the ability to influence the affairs of the company.

60. Alternatively, we request comment on whether a greater than 25 percent ownership interest should be considered affiliation under our rules. This level would be consistent with the Section 310(b)(4) of the Communications Act benchmark for indirect foreign investment in radio facilities in the United States. A greater than twenty-five percent investment would likely be a level of ownership that would give a foreign carrier a large enough stake to have an incentive to discriminate in favor of its U.S. affiliate. However, we are concerned that a 25 percent level could be perceived by U.S. carriers as so high that it would discourage procompetitive foreign investment.

61. We propose that, in addition to a controlling interest

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[45] See Telephone Company-Cable Television Cross-Ownership rules, Section 63.54 - 63.58.

at any level,[46] investment by a foreign carrier in a U.S. international common carrier over a specified threshold will be subject to the entry standard discussed in Section III.B.1, supra. We request comment on whether that threshold level should be set at greater than ten percent, 25 percent, or some other level of capital stock.[47] If a foreign carrier controls a U.S. carrier, or invests more than the specified threshold level in the U.S. carrier, the foreign carrier would be considered affiliated with the U.S. carrier. The affiliated U.S. carrier would then be subject to the entry standard proposed in Section III.B.1. We also request comment on how we should apply our effective market access test in situations where more than one foreign carrier or a foreign carrier consortium has ownership interests in a U.S. carrier.

62. We propose not to include in our definition of affiliation non-equity business relationships between carriers (e.g., where a U.S. carrier is involved in a joint venture with a foreign carrier to manufacture switching equipment). While such relationships between carriers can also provide them with the incentive to favor one another in the exchange of basic services, we tentatively conclude that such incentives are relatively attenuated compared with those that are present with ownership interests. We seek comment on this conclusion.

63. We also tentatively conclude that no foreign carrier entry regulation is required for co-marketing arrangements, such as AT&T's WorldPartners Company, provided they are, both in theory and in practice, nonexclusive[48] (e.g., they do not give the

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[46] We propose to assess control based on Commission precedent under Sections 310(d) and 214(a) of the Act. See International Services, 7 FCC Rcd at 7333, para. 13, n.28.

[47] Our assessment of "capital stock" ownership will be done under the standards developed in Commission case law for determining such ownership.

[48] The nonexclusivity requirement would apply at least until we are assured of effective facilities-based competition on the foreign end. This requirement is grounded in antitrust concerns. Normally, cooperative arrangements between firms in "vertical" situations -- where one firm passes on a service, such as a phone call that originated in a foreign country, to a firm that completes it, such as a telecommunications company in the United States -- create efficiencies and are consistent with antitrust principles. When the upstream company is a monopoly or has "market power," however, the potential exists for discrimination and skewing of competition in the "downstream" market (calls terminating in the United States in the above hypothetical). See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263,

U.S. carrier the exclusive right to provide joint basic services in correspondence with any particular foreign carrier[49]). We conclude, however, that we need to review whether our public interest goals would be served by imposing reporting requirements on U.S. carriers that participate in co-marketing arrangements for the provision of basic global network services. It appears at a minimum that, under Section 43.51 of the Commission's Rules, these types of arrangements require the filing of their co-marketing agreements.

64. Finally, we further propose to reserve the right to review any transaction that involves foreign carrier participation in which unique factors suggest Commission review would be necessary to serve the public interest, even with foreign carrier participation at levels below the investment threshold chosen. We seek comment on all of the above proposals and tentative conclusions.

b. Affiliation for Purposes of Post-Entry Regulation

65. After we have determined that the public interest would be served by permitting a certain foreign carrier to enter the U.S. market, the next step is to determine whether the carrier should be regulated as dominant or nondominant. Part of the decisionmaking process, as established in International Services, is a determination whether the carrier is "affiliated" with a foreign carrier. In that proceeding, we defined a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. We use this definition to classify a U.S. carrier as dominant or nondominant on a particular international route, based on the market power of its foreign affiliate.[50] As the Commission noted, however, the order did not address the question of entry standards for foreign-affiliated entities.

66. In light of our goals, and proposed definition of

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276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). The nonexclusive requirement is designed to mitigate any such discrimination.

[49] See International Services, 7 FCC Rcd at 7333, para. 11.

[50] Under the framework adopted in International Services, we regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a foreign affiliate of the carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic. 7 FCC Rcd at 7332-3, para. 10.

affiliation for purposes of regulating entry, we request comment on whether we should revise the definition of affiliation adopted in International Services to conform to the one proposed for entry purposes. One consequence of redefining affiliation at a less-than-controlling interest for purposes of applying dominant carrier regulation is that more carriers would be subject to such regulation. For instance, a U.S. carrier that is currently regulated as nondominant could now be deemed dominant on a particular U.S. international route if the foreign carrier on the other end of the route has, or acquires, a less-than-controlling ownership interest in the U.S. carrier. Likewise, if a U.S. carrier acquires a less-than-controlling interest in a foreign carrier on a particular U.S. international route, that carrier could be deemed dominant on that route.[51] Considering these consequences and issues of administrative simplicity, we ask for comment on whether it is desirable to conform these affiliation definitions for purposes of entry and post-entry regulation.

3. Definition of Facilities-based Carrier

67. Our regulation of international services relies upon a distinction between facilities-based services and resale. However, IDB's petition raises the fundamental question of whether our current rules clearly distinguish between resellers and facilities-based carriers. IDB asserts that recent Commission actions, including our International Resale Policy decision,[52] have caused disputes regarding the definition of a facilities-based carrier. IDB contends we have historically treated a carrier that leases a cable or satellite circuit as a facilities-

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[51] See 47 C.F.R. § 63.10. Although we do not propose to do an effective market access analysis whenever a U.S. carrier acquires a foreign carrier, see supra para. 50, we reiterate that dominant carrier regulation would apply if the foreign carrier acquired is a monopoly carrier, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules. In addition, we propose to impose the same dominant carrier and other nondiscrimination safeguards on the U.S. carrier that we impose on foreign carrier affiliates that we authorize to enter the U.S. market.

[52] Regulation of International Accounting Rates, Phase II First Report and Order, 7 FCC Rcd 559 (1991)(International Resale Policy); see also Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992)(Phase II Order on Reconsideration). To prevent evasion of the settlements process through one-way resale of private lines for the provision of switched services into the United States, we require that applicants seeking authority to resell international private lines for the provision of switched services demonstrate that the country at the other end of the private line affords equivalent resale opportunities.

based carrier, but that our International Resale Policy treats those who operate by leasing private line circuits as resellers. Further, IDB notes that we have imposed upon resellers the Section 63.15(b) circuit-addition reporting requirement[53] that we previously applied only to facilities-based carriers.[54]

68. IDB urges us to adopt a consistent definition of a facilities-based carrier that turns on whether the carrier has acquired the "maximum interest" in a cable or satellite circuit permitted by law. IDB argues that, under such a rule, a carrier would be considered facilities-based in the United States if it purchases an ownership or indefeasible right of user (IRU) interest in a cable or satellite or leases satellite capacity directly from Comsat, because those are the maximum interests allowed under U.S. law. To the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit,[55] IDB would have us treat as facilities-based a carrier that directly leases a half-circuit, if that is the maximum interest allowed in that country. IDB believes there is no rational basis for treating carriers that lease capacity from Comsat as facilities-based, while treating carriers as resellers when they lease capacity from foreign carriers with legal monopolies over their countries' telecommunications infrastructures.

69. AT&T opposes IDB's request and characterizes it as an attempt to evade our International Resale Policy. AT&T argues that IDB's proposed "maximum interest" test would vitiate the meaning of a facilities-based carrier. AT&T notes that the International Resale Policy was prompted by a concern that "one-way resale" from countries that do not afford "equivalent" resale opportunities could increase U.S. facilities-based carriers' outpayments, increase their cost of service, and thus harm U.S. customers. IDB's proposed definition would, according to AT&T, legitimize such one-way resale by redefining all resellers overseas as facilities-based and thus exempting them from the equivalency requirement.[56]

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[53] See IDB Petition at 4-5 (citing LDDS Communications, Inc., 8 FCC Rcd 924 (1993); fONOROLA and EMI, 7 FCC Rcd 7312(1992), Order on Recon., 9 FCC Rcd 4066 (1994)).

[54] 47 C.F.R. § 63.15(b) (1994).

[55] IDB disputes the Commission's jurisdiction over foreign half-circuits. See IDB Petition at 9, n.19.

[56] AT&T Comments at 5. AT&T also argues that any doubts as to who should file Section 63.15 reports will be clarified in the rulemaking in CC Docket No. 93-157.

70. MFS supports IDB's rulemaking request. MFS notes that other countries are following U.S. initiatives in liberalizing telecommunications but do not yet permit carriers competing with the established carrier to own their own international transmission circuits. MFS asserts that the Commission's current definition merely prevents U.S. entities from entering overseas markets. MFS believes that IDB's proposed maximum interest definition would allow such competition to flourish. Such entry, according to MFS, would allow U.S. carriers to reduce foreign users' cost of communications service and would pressure existing carriers to reduce their prices.

71. We tentatively conclude that we should continue our current policy of treating a carrier as facilities-based in the United States if it purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or noncommon carrier), or if it leases a U.S. half circuit from Comsat or from a noncommon carrier international satellite or submarine cable provider.[57] Our concern with IDB's proposal is that it could undermine our International Resale Policy by permitting carriers to interconnect foreign leased circuits with the U.S. public switched network without demonstrating that the foreign country affords equivalent resale opportunities to U.S. carriers. This would result in an undesirable increase in the settlements deficit. In addition, it could implicitly encourage foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limiting competition to resale of leased circuits. Our current definition avoids this result and is consistent with the public interest goals of this proceeding. We propose to codify that definition in this proceeding. We request comment on our proposal to codify this definition of a U.S. facilities-based carrier.

4. Resale Entry by Foreign Carriers

72. We do not believe there is a need to regulate foreign carrier entry in the U.S. market for resale services as closely as we propose for facilities-based services. There is not as substantial a risk of anticompetitive harm to the global market when we allow foreign carriers into the U.S. international resale market. This risk is greatest when foreign carriers acquire U.S. international facilities. The ability to own and control facilities enables a carrier to manage competition by resellers. A reseller has minimal pricing flexibility when it must rely on a competitor that also supplies the infrastructure and underlying basic services which a reseller must use to provide its own services. In addition, the reseller cannot guarantee the quality

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[57] See, e.g., Phase II Order on Reconsideration, 7 FCC Rcd at 7931.

of its services because the underlying facilities necessary to provide service are not within its control.

73. We also do not believe that applying an effective market access analysis to resellers would do as much to further the liberalization of foreign markets as applying this standard to facilities-based carriers, which generally have significant influence in the liberalization debate within their primary markets. And finally, our experience indicates that our existing entry standards for resellers have encouraged vigorous and effective competition among international resellers, providing significant benefits to users. Under these circumstances, we propose to continue to apply relatively flexible entry requirements to foreign-affiliated resellers, as detailed below.

a. Resale of Switched Services

74. We tentatively conclude that our goals are well served by maintaining our open entry policy for international resale of switched services. We found in International Services that open entry for switched service resale increases the competitiveness of the international market, without resulting in substantial potential for competitive harm..[58] There we established the presumption that even U.S. carriers with foreign-carrier affiliations should be regulated as nondominant in their provision of resold international message telephone service (IMTS). Although we did not adopt an entry standard in International Services, we now tentatively conclude that this presumption equally holds true for entry questions, i.e., that there should be a presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries. As in International Services, we propose that this be a rebuttable presumption. We invite comments on these tentative conclusions.

b. Resale of Private Lines

75. The resale of private line services raises different market entry concerns from the resale of switched services. We recognized in International Services that there is a greater potential for discrimination in the provisioning of resold private lines. When a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier the foreign half-circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. A foreign carrier that owns or controls telecommunications facilities in both the United States and the destination market may have a competitive advantage over other U.S. carriers. This occurs if the foreign carrier has sufficient

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[58] International Services, 7 FCC Rcd at 7335, para. 31.

market power in the destination country to discriminate among U.S. carriers in the provisioning, pricing or interconnection of the foreign end of the private line.

76. **Resale of Noninterconnected Private Lines.** We currently have an open entry policy for foreign-carrier resale of noninterconnected private lines. Resale of international private lines does not directly implicate the settlements process to the extent such lines are used only to carry non-switched traffic. Given the benefits of competitive provision of noninterconnected private lines, the lack of impact on the settlements deficit, and the availability of safeguards to protect against discrimination in the provisioning of private lines, we propose to adopt a rebuttable presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for noninterconnected private line resale.

77. **Resale of Interconnected Private Lines to Provide Switched Services.** We also propose to continue our current policy on foreign-carrier entry by resale of private lines interconnected to the public switched network. We believe that the equivalency requirement established in our International Resale Policy decision[59] is sufficient to ensure that a foreign monopoly carrier would be unable to exploit its market power with respect to its provision of interconnected private line services. We seek comment, however, on whether we should modify our equivalency requirement to conform to our effective market access standard. We ask for comment on whether a consistent approach to

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[59] See International Resale Policy, 7 FCC Rcd 559. The equivalency determination includes an analysis of whether foreign government regulation (1) permits open entry for U.S.-based carriers into the international resale market; (2) mandates nondiscriminatory treatment of U.S.-based carriers; and (3) authorizes U.S.-based carriers to interconnect international private lines to the PSN at both ends. We have also emphasized that the prices, terms and conditions afforded U.S.-based carriers should be equivalent to those available to foreign-based carriers providing service in the foreign country. We have examined foreign regulatory controls to ensure that they are sufficient to limit the ability of the foreign market facilities-based carrier(s) to favor particular carriers or to cause competitive harm to the resale market generally. Our equivalency determinations have presumed an incentive to impede competition and analyzed foreign-market regulatory controls on the ability of the foreign facilities-based carrier(s) to exercise that incentive successfully. Our International Services order also provides for dominant carrier regulation of an affiliated foreign carrier where it appears that U.S. safeguards are necessary to supplement foreign government safeguards against potential discrimination.

determining equivalency and effective market access would make this standard clearer and more administratively feasible.

78. AT&T has argued in other proceedings that we should adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.[60] AT&T argues that, without such a requirement, bilateral negotiations to reduce accounting rates will be futile. In support, AT&T states that, as a direct competitor with U.S. carriers, a foreign carrier will have every incentive to maintain above-cost accounting rates to keep the costs of U.S. facilities-based carriers' services higher. AT&T states that to avoid this squeeze by the foreign carrier, U.S. facilities-based carriers will be forced to make the uneconomic decision to use private line facilities, not because they are more efficient or less costly than embedded switched facilities, but to avoid the foreign carrier's above-cost accounting rate. We invite comment on these arguments in this proceeding.

79. As a final matter, to eliminate any confusion over the scope of the prior certification requirement adopted in the International Resale Policy order,[61] we propose to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit to provide a switched, basic service must obtain specific Section 214 authority to do so. This requirement applies regardless of whether the carrier owns, leases, or has an IRU interest in the U.S. half-circuit. That is, this requirement applies regardless of whether the carrier is providing service on the U.S. half-circuit as a facilities-based carrier or a reseller.[62] It also applies regardless of whether the carrier is originating traffic in the United States or terminating traffic in the United States. Prior certification on a country-by-country basis is necessary in order to effectively enforce the equivalency policy that we adopted in the International Resale Policy order.[63] We request comment, however, on whether we should permit a private line reseller that has received an initial Section 214 certificate to provide a switched, basic service using a leased foreign half-circuit to add countries without prior certification once we have

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[60] See Supplemental Comments of AT&T, filed October 21, 1994, in BT North America, Inc., File No. I-T-C-93-126, DA 95-120, rel. Jan. 30, 1995 (application for authority under Section 214 of the Act to provide international resale services).

[61] See 7 FCC Rcd at 562, para 24.

[62] See supra Section III.B.3 (proposing to maintain our current definition of a facilities-based carrier).

[63] See 7 FCC Rcd 559 (1991).

adopted an order finding such countries to afford equivalent resale opportunities to U.S. carriers. Commenters should address whether notification to the Commission of additional countries is sufficient or even necessary.

5. Other Forms of Market Entry

80. AT&T requests that we make this rulemaking applicable not only to carriers that hold international facilities-based Section 214 authorizations, but also to all U.S. telecommunications services providers, both domestic and international, including enhanced service providers. As detailed below, we believe that our current rules and policies governing domestic interexchange services, enhanced services, separate satellite systems and other noncommon carrier services do not warrant change. Accordingly, we propose to apply the rules we adopt in this proceeding only to common carriers providing international facilities-based services pursuant to Section 214 of the Act. We request comments on this tentative conclusion.

a. Domestic Interexchange Services

81. Historically, we have not imposed foreign-ownership restrictions on domestic interexchange services, other than the statutory requirements of Section 310 of the Act which limit foreign ownership of common carrier radio facilities. We believe that the public interest goals identified above are well served by this open entry standard for domestic interexchange service. A foreign carrier whose U.S. affiliate provides domestic interexchange service may not use its bottleneck facilities to disadvantage unaffiliated U.S. interexchange carriers where there is no direct interconnection of those facilities to the foreign carrier's U.S. interexchange facilities. We find this fact, combined with the competitive benefits of our longstanding open entry policy for domestic service, and the administrative burden of regulating entry, to outweigh any anticompetitive effects that might occur as a result of permitting foreign carriers to operate in the U.S. domestic market.

b. Enhanced Services

82. As for enhanced services,[44] we have previously found that their deregulation under Title II of the Act has served the public interest. We have not placed any restrictions on the provision of enhanced services by foreign-owned service providers. Continuing to permit foreign carriers to provide enhanced services presents no substantial risk of competitive harm in the market for such services. Therefore, continued deregulation of these services will also serve our goal of

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[44] See 47 C.F.R. § 64.702.

promoting effective global competition.

c. Separate Satellite Systems and Other Noncommon Carriers

83. Finally, for similar reasons we do not propose to apply foreign carrier restrictions to participation in separate satellite systems and other noncommon carrier facilities. Foreign carriers seeking to enter the U.S. market to provide international common carrier facilities-based services would be subject to our proposed effective market entry standard whether they use separate satellites, private submarine cables, or traditional common carrier transmission facilities.

C. Modification of Dominant Carrier and Other Operating Safeguards

84. In light of our tentative conclusions with respect to market entry and affiliation issues, we seek comment on whether we should modify our existing rules for determining the regulatory status (i.e., dominant or nondominant) of U.S. carriers that are affiliated with foreign carriers.[65] We asked whether we should change our definition of affiliation to be consistent with whatever approach is adopted in response to the proposals in Section III.B.2, supra.[66] In this section, we propose to maintain the other aspects of the framework we adopted in International Services for determining the regulatory status of affiliated U.S. carriers. We believe this approach will best serve the goals of this proceeding.

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[65] See International Services, 7 FCC Rcd 7331 (1992); 47 C.F.R. §§ 63.01(r), 63.10, and 63.11. The Commission regulates U.S. international common carriers that are dominant because of foreign affiliations, as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated U.S. international carriers through the control of bottleneck services and facilities in the foreign market. With respect to those routes for which it is regulated as dominant, an affiliated carrier must: (a) obtain Commission approval before adding (or discontinuing) circuits; (b) file cost-support with its tariffs, which are effective only after 45 days notice (as opposed to 14 days for a nondominant carrier); and (c) report quarterly (as opposed to annually) on traffic and revenues. The rules adopted in International Services did not modify the dominant carrier status, for the provision of certain international services, of AT&T, Comsat or U.S. carriers that provide international service for noncontiguous domestic points. 7 FCC Rcd at 7342, n.2.

[66] See supra para. 66.

85. We take this opportunity, however, to seek comment on whether we should modify the nondiscrimination safeguards that we traditionally apply to carriers regulated as dominant under our International Services decision. Our experience in recent years suggests some of our safeguards can perhaps be better tailored to meet our regulatory concerns. Accordingly, we request comment on whether we should eliminate the requirement that dominant, foreign-affiliated carriers file tariffs on 45 days notice with cost support, and allow them to comply with nondominant carrier rules (i.e., file their tariffs on 14 days notice without cost-support). We propose maintaining our requirements that a carrier obtain prior Commission approval before adding (or discontinuing) circuits on those routes for which the carrier is regulated as dominant and that it file quarterly traffic and revenue reports for those routes. We request specific comment, however, on whether the prior certification requirement is necessary if we adopt the entry approach proposed in this rulemaking.

86. We also propose a new requirement, adopted in the BT/MCI Order, that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign carrier affiliate, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the U.S. carrier and its foreign carrier affiliate participate. These records should be available to the Commission upon request. We also propose to require that the U.S. carrier obtain a written commitment from its foreign carrier affiliate not to offer or provide, with respect to the provision of basic services, any special concessions to any joint venture for the provision of U.S. basic or enhanced services in which they both participate. We do not propose to change our current rule that prohibits any carrier that has an affiliation with a foreign carrier from agreeing to accept special concessions from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country. This "no special concessions" rule applies regardless of an affiliated carrier's regulatory status.[67] We seek comment on all these proposals and alternatives to these proposals.

87. We further propose to require that any affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched services file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries. We also propose to apply this transparency requirement to affiliated carriers that we regulate as dominant in their provision of switched basic services via resold private lines.

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[67] See 47 C.F.R. § 63.14.

The required list of accounting rates would cover and specify all traffic relations and services of the foreign affiliate. We would require that this filing be made within 60 days of release of a Commission order classifying the carrier as dominant for the provision of switched services. We would also require that the carrier file within 30 days of the end of each calendar quarter any changes in its affiliate's accounting rates agreed to during that quarter. We propose to apply this transparency requirement to all facilities-based carriers and private line resellers now or hereafter classified as dominant for the provision of U.S. international switched services.

88. It has been U.S. policy within the International Telecommunication Union (ITU) and other international fora to promote cost-based, nondiscriminatory and transparent accounting rates. Full disclosure of the foreign carrier's accounting rates will enable us to determine whether there is a noncost-based disparity between the rates maintained by that carrier with U.S. carriers and the rates it maintains with its other foreign correspondents.[68] Here, the information that we propose to require may assist us in monitoring the impact of foreign carrier entry, and self-correspondency, on U.S. accounting rates and whether such entry fosters or impedes progress in reducing accounting rates.

89. We propose not to apply this transparency requirement to a foreign-affiliated carrier that provides switched services on a particular route solely through the resale of U.S. carriers' switched services. Such activity has little or no impact on the level of accounting rates. In addition, affiliated carriers that resell U.S. switched services are presumptively nondominant in any event.[69] Because we have not found the provision of private line service to have a significant impact on the settlements process, we also do not propose to apply this transparency requirement to carriers regulated as dominant solely for the provision of private line services.

90. To the extent we modify our existing dominant carrier safeguards, we propose, with the exception noted for transparent accounting rates, to apply the new safeguards to a U.S. carrier's

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[68] We have directed U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by a given foreign administration within its own region and those applied for the United States. Regulation of International Accounting Rates, Phase I First Report and Order, 6 FCC Rcd 3552, 3556 (1991), recon. denied, 7 FCC Rcd 8049 (1992).

[69] See 47 C.F.R. § 63.10(a)(4).

provision of all basic services for which we regulate it as dominant on a particular route. These dominant carrier safeguards, with the exception of the transparency requirement, would thus apply to U.S. carriers considered dominant on particular routes whether for the provision of facilities-based or resale services.

91. We also request comment on AT&T's proposal that we expressly prohibit a foreign carrier or its U.S. affiliate from refiling U.S. originating or terminating traffic, without the consent of the originating and terminating carriers. We request comment on whether an express prohibition is necessary, and how we should define the act of refiling. As for AT&T's request for a condition of proportionate return, since the 1950's, one of the guiding principles in our scrutiny of international traffic relations has been that U.S. carriers "should be permitted to share proportionately in . . . inbound traffic in order to be able to compete effectively."[70] We have consistently applied this principle,[71] waiving it only where required by the public interest, as for example, when a foreign administration lacked technology capable of providing proportionate return.[72] We now propose to codify our proportionate return policy as a rule of general applicability to all carriers.[73] That is, all carriers, whether affiliated or not, must accept only their proportionate share of return traffic from foreign correspondents. Under this rule, we will, of course, continue to grant waivers where necessitated by the public interest.

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[70] Mackay Radio, 19 FCC 1321, 1340 (1954).

[71] See, e.g., Telefonica Larga Distancia Puerto Rico, 8 FCC Rcd 106 (1992); FTC Communications, Inc., 4 FCC Rcd 5633(Com. Car. Bur. 1989); U.S. Sprint, 3 FCC Rcd 1484 (Com. Car. Bur. 1988); American Tel. & Tel. Co., 2 FCC Rcd 6409 (Com. Car. Bur. 1987).

[72] See TRT Telecommunications Corp, 49 FCC2d 1408 (1974); TRT Telecommunications Corp., 46 FCC2d 1042 (1974).

[73] In Regulation of International Accounting Rates, Phase II Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040, 8045 (1992), recon. pending, we requested comment on whether allowing some flexibility in our nondiscriminatory accounting rate, division of tolls, or proportionate return policies might be an appropriate means of achieving lower accounting rates as facilities-based competition is introduced in foreign countries. 7 FCC Rcd at 8046. We do not believe that this outstanding issue detracts from the desirability of codifying proportionate return as a rule of general applicability.

D. Section 310(b)(4) Standard for Radio Licensee Ownership By Foreign Entities

92. International Section 214 authorizations are required for the provision of international basic telecommunications services via any transmission facility on either a resale or facilities basis. In addition, authorizations under Title III of the Act are required for those entities seeking to operate specified classes of radio (wireless) station facilities. As explained in Section II.C. supra, Section 310(b)(4) establishes a 25 percent foreign ownership benchmark for the parent holding company of common carrier, broadcast, and aeronautical fixed and en route ("aeronautical") radio licenses.[74] We ask whether the goals of this proceeding would be served by incorporating the proposed effective market access standard into the public interest determinations under Section 310(b)(4)in situations where the foreign ownership would exceed the 25 percent statutory benchmark. Thus, related to our proposal that effective market access should be a part of the public interest showing under Section 214 of the Act, we also ask whether the same factors should be part of our public interest analysis under Section 310(b)(4) of the Act regarding applications for Title III common carrier and aeronautical fixed and en route radio licenses.[75] We further seek comment on whether the effective market access standard should be incorporated into the public interest

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[74] Section 310(b)(4) states, in pertinent part:

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by --
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> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4) (1982).

[75] We do not propose to apply the affiliation standard discussed in Section III.B.2. because the Section 310(b)(4) foreign ownership benchmark is a statutory requirement not subject to change.

determination under Section 310(b)(4) concerning applications for broadcast licenses. As discussed below, the Commission has traditionally taken a stricter approach to alien ownership determinations under this provision where broadcast licenses are involved given the control over the content of transmissions exercised by broadcasters.

1. Application to Common Carrier Licenses

93. Under the plain language of the Communications Act and its legislative history, the Commission has broad discretion in applying Section 310(b)(4). Indeed, the legislative history of Section 310 itself concerning foreign investment in parent holding companies reflects Congressional concern that rigid restrictions "would probably seriously handicap" U.S. companies engaged in international communications with large interests in foreign countries in connection with their international communications.[76] In addition, the Commission is authorized to consider reciprocal treatment under Section 308 of the Act.[77]

94. In those instances where the Commission has authorized foreign ownership or participation beyond the statutory benchmarks, the Commission has generally considered the level of foreign presence in light of the extent of U.S. presence in other areas (ownership, officers, or directors) relevant to a public interest determination under Section 310(b)(4).[78] In GRC Cablevision, Inc., for example, where the Commission allowed 60 percent alien ownership of a licensee's parent, it specifically noted that the majority of the parent's board of directors was comprised of U.S. citizens and the parent itself was a U.S. corporation. Furthermore, the Common Carrier Bureau noted in

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[76] S. Rep. No. 781, 73 Cong., 2d Sess. 7 (1934).

[77] See 47 U.S.C. § 308(c)(1982), which states "[t]he Commission in granting any license for any station intended or used for commercial communication between the United States ... and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States," approved May 24, 1921 ["Submarine Cable Landing License Act"]." The Submarine Cable Landing License Act states in part that licenses may be withheld if it will assist the United States in securing rights for the landing or operation of cables in foreign countries. See 47 U.S.C. § 35.

[78] See, e.g., GRC Cablevision, Inc., 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); IDB Communications Group, Inc., 6 FCC Rcd 4652 (Com. Car. Bur. 1991); and Teleport Transmission Holdings, 8 FCC Rcd 3063 (Com. Car. Bur. 1993).

Millicom,[79] where it approved greater than 25 percent alien presence on the board of directors, that 90 percent of the shareholders and a majority of the board were U.S. citizens. More recently, the Common Carrier Bureau approved 65 percent alien ownership in a licensee's parent where there was a 75 percent U.S. presence in the corporate roles of officers and directors.[80] Additionally, the Commission has also considered in its public interest analysis whether the Title III licensees involved are common carrier licensees with no control over the content of the transmissions.[81]

95. Section 310(b)(4) public interest determinations are often required at the same time as Section 214 authorizations when foreign carriers seek to enter the U.S. market, and many of the same policy considerations apply. We ask, therefore, whether a similar approach would be useful in both contexts. It appears that, in the case of common carrier radio licenses generally, such an approach would well serve the goals of this proceeding. Therefore, when an applicant in whom foreign ownership in the parent holding company exceeds the 25 percent benchmark seeks a common carrier radio license, or when a U.S. licensee seeks to increase the level of foreign ownership in its parent holding company beyond the 25 percent benchmark or previously authorized levels of foreign ownership, we ask whether our evaluation of the public interest should consider whether the foreign entity's primary markets pass the effective market access test.

96. Thus, for example, if a foreign entity seeks to invest in the parent holding company of an applicant for authority to provide Personal Communication Services ("PCS"), should we consider whether U.S. companies can provide PCS, or its functional equivalent, in the foreign entity's primary market? We also seek comment on whether, just as with our public interest analysis under Section 214, we should find that our effective market access finding under Section 310(b)(4) is not dispositive of our decision to license a particular entity. For instance, once we have reviewed the effective market access element of our public interest analysis, should we also assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market? Such factors in this context could include the state of liberalization in the foreign country's other radio-based service markets, national security, or the competitiveness of the applicant's target market in the United States. Finally, we seek comment on whether, if we do

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[79] See Millicom Inc., 4 FCC Rcd 4846 (1989).

[80] Teleport Transmission Holdings, 8 FCC Rcd at 3065.

[81] See, e.g., Millicom, 4 FCC Rcd at 4847; Teleport Transmission, 8 FCC Rcd at 3064-65.

consider effective market access, this would be a more tailored and predictable application of Section 310(b)(4) that will assist us in encouraging and recognizing foreign countries' efforts to liberalize their communications market.

2. Application to Aeronautical Licenses

97. Section 310(b)(4) of the Act also applies to aeronautical en route and aeronautical fixed radio licenses. Aeronautical en route stations provide air-ground communications for the operational control (flight management) of aircraft by their owners or operators. Communications relate to the safe and efficient operation of aircraft.[82] The vast majority of en route stations are licensed to Aeronautical Radio, Inc. (ARINC).[83]

98. Although there have been no foreign ownership determinations made in this area, it appears there may be benefits in applying the effective market access test to these aeronautical services. With the increasing presence of foreign airlines in U.S. markets and the potential for increased foreign ownership of U.S. airlines, this issue could arise in the near future. Accordingly, we ask whether the effective market access test also should be applied to these aeronautical licensees.

3. Application to Broadcast Licenses

99. Given the potential benefits of considering market access as a factor in our foreign ownership determinations for common carrier and aeronautical licensees, we believe it is appropriate to ask whether a similar approach should be utilized in evaluating broadcast applications that propose indirect alien ownership in excess of the 25 percent statutory benchmark. We note in this context that we have had a traditionally heightened concern for foreign influence over or control of licensees which exercise editorial discretion over the content of their transmissions.

100. The distinction between common carrier and broadcast

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[82] En route stations are the means by which companies satisfy Federal Aviation Administration requirements to maintain reliable communications between each aircraft and its dispatch office, in the case of large airlines, or maintain flight following systems, in the case of small airlines and commercial aircraft operators. Aeronautical fixed stations provide point to point communications pertaining to safety, regularity and economy of flight.

[83] ARINC renders its services on a non-profit basis with costs distributed in proportion to use. Its principal stockholders as well as its principal customers are the U.S. scheduled airlines.

interest analysis. We suggest two alternative levels of foreign carrier ownership that would trigger this analysis: interests of greater than either 10 percent or 25 percent. We do not propose to change our approach to foreign carrier Section 214 applications for reselling international switched or private line services, or for providing domestic interexchange or enhanced telecommunications services.

105. We also ask whether we should adopt the effective market access test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest in U.S. radio facilities. Thus, when a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier, aeronautical radio or broadcast facility, we seek comment on whether we should find that an important element of the public interest requirement of Section 310(b)(4) has been met if the primary markets of the foreign entity offer effective market access to U.S. carriers to provide the same type of radio-based services as requested in the United States. We ask whether we should also consider other factors under our public interest analysis. We seek comment on all aspects of the proposals described above, and invite additional suggestions on how the Commission may best reach its stated goals.

106. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A, Section II. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice (see Appendix A, Section III), but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1980).

V. ORDERING CLAUSES

107. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on the proposals in this Notice.

108. IT IS FURTHER ORDERED that AT&T's petition for rulemaking is GRANTED IN PART to the extent that we are initiating a rulemaking to address foreign carrier entry into the U.S. market, and denied in all other respects.

109. IT IS FURTHER ORDERED that IDB's petition for rulemaking is GRANTED IN PART to the extent that we clarify our definition of what is a facilities-based carrier and seek comment on our definition, and denied in all other respects.

110. This action is taken pursuant to Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r).

111. For further information on this Notice contact Troy F. Tanner or Susan O'Connell, Attorney-Advisors, Policy and Facilities Branch, Telecommunications Division, International Bureau, (202) 418-1470.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
Procedural Matters

I. Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

II. Initial Regulatory Flexibility Act

A. Reason for Action

This rulemaking proceeding is initiated to obtain comment regarding proposed changes to the Commission's entry standard for foreign carriers desiring to enter the U.S. international telecommunications market, as well as changes to the Commission's public interest standard for foreign entities that seek to acquire an indirect interest in a U.S. common carrier, aeronautical, or broadcast radio license. Comment is also requested on proposed modifications to the Commission's dominant carrier safeguards as well as to other non-discrimination safeguards. Comment is also sought on the Commission's definition of an international facilities-based carrier.

B. Objectives

The Commission seeks to establish standard rules and procedures to regulate foreign entry into the U.S. marketplace in order to promote effective competition and prevent anti-competitive conduct in the market for international communications services, as well as to open foreign communications markets.

C. Legal Basis

The proposed action is authorized under Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r).

D. Reporting, Recordkeeping and Other Compliance Requirements

The actions contained in this Notice of Proposed Rulemaking may affect large and small carriers. We propose to require that dominant, foreign-affiliated carriers maintain or provide certain records regarding their foreign affiliates. These carriers may be required to comply with proposed requirements to file certain

reports, but this is not estimated to be a significant economic burden for these entities.

E. Federal Rules That Overlap, Duplicate or Conflict With These Rules

None.

F. Description, Potential Impact, and Number of Small Entities Involved

To the extent that the proposals discussed in this Notice of Proposed Rulemaking propose to make equity investment by foreign telecommunications carriers in U.S. carriers more difficult, carriers seeking foreign investment greater than the proposed threshold will be adversely affected. These proposals are intended to ensure that U.S. carriers can compete effectively in international markets and to open closed foreign markets. Copies of this Notice will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comment on a variety of alternatives to achieve Commission objectives.

III. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 28, 1995 and reply comments on or before April 28, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

Separate Statement
of
Commissioner James H. Quello

February 7, 1995

Re: Market Entry and Regulation of Foreign-Affiliated Entities
(IB Docket No. 95-22).

I am concerned about the timing and scope of this Notice of Proposed Rule Making. While it is commendable for this Commission to clarify our rules regarding foreign carrier entry in an evolving and increasingly international communications marketplace, I am troubled that we are proposing review of Section 310 of the Communications Act when Congress has targeted foreign ownership as a subject for legislative action. Although I have long maintained that a Commissioner may ask any question of interest in a Notice of Proposed Rule Making, I believe that it is our role to seek and accept guidance from Congress; particularly when a subject is under active consideration in the Legislative Branch of our Federal Government. I believe that it unnecessarily complicates the resolution of this docket to incorporate a review of Section 310 into what could have been more expeditiously handled by a clarification of Section 214, as requested by the parties.

In what I believe is a misguided attempt to reach legal symmetry, this NPRM raises the issue of the application of possible revisions of Section 310 to broadcast facilities. I note, however, that we do not draw a tentative conclusion but, rather, merely seek comment on whether any revisions in our analysis of Section 310, if adopted, should apply to other than telephone carriers.

In clarifying our analysis under our statutory mandate, we must recall the history of the Communications Act. Restrictions on control of broadcast facilities were a bedrock principle of the Communications Act. In addition to legislative intent underlying the Communications Act of 1934, we must be mindful of current legislative activity. Telecommunications reform legislation attracted broad bipartisan support and came very close to passage in the previous Congress. Comprehensive telecommunications legislation has been identified as a priority in this current 104th Congress. Therefore, I believe that the Legislative Branch of our Federal Government, rather than this Commission, properly should take the lead in any reconsideration of Section 310, as they have indicated they are so doing.

In light of these concerns, I specifically ask commenters to address the issue of the appropriate scope of this proceeding.

February 7, 1995

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Market Entry and Regulation of Foreign-affiliated Entities

Global business and global competition require global telecommunications services. By one estimate, the global telecommunications services industry will generate close to $1 trillion in revenue by the end of the decade. Access to foreign markets is therefore critical to the competitiveness of American companies seeking to enter this worldwide telecommunications market. The U.S. communications market is attracting foreign investment and increasing numbers of foreign carriers. Yet a recent study concludes that prohibitive market entry and foreign investment regulations of our trading partners are restricting the ability of our carriers to compete globally.

The Notice of Proposed Rulemaking we adopt today asks fundamental questions about the relevance of asymmetric market conditions to the entry of foreign entities into U.S. communications markets. Our approach is both cautious and well-reasoned. The Notice tentatively proposes to make the openness of a foreign carrier's home markets an explicit factor in our public interest analysis of that carrier's Section 214 application to enter the international services market in the United States. It further asks whether this same market access approach is appropriate when considering requests under section 310(b)(4) to exceed the statutory benchmarks for foreign ownership of radio licensees.

The Notice correctly notes the historical difference in the FCC's treatment of foreign ownership of broadcast radio facilities and common carrier facilities. I support our affirmation of the continued need under our public interest analysis for heightened scrutiny where a foreign entity will exercise editorial control over the content of transmissions.

Market access will not be the only factor in our analysis, nor will it be dispositive. We will continue to consider other public interest factors in making our determinations, such as the promotion of competition in global markets, the presence of cost-based accounting rates and any national security implications.

FCC consideration of foreign market access in these contexts should be welcomed by those countries, like the United Kingdom, that have significantly liberalized their telecommunications markets, and should provide renewed incentive to those markets that are moving, although more slowly, toward liberalization. I believe that this Notice reflects the good faith of the United States by proposing a further liberalization of our telecommunications market and by clarifying our policy on foreign carrier entry.

The Notice lays important groundwork as U.S. companies move increasingly into the global telecommunications services market. A thorough examination of the issue of market access also signals to the world our awareness that open markets are essential components in a Global Information Infrastructure (GII). As Vice President Gore stated in his speech to the World Telecommunications Development Conference in Buenos Aires, Argentina: "The commitment of all nations to enforcing regulatory regimes to build the GII is vital to world development and many global social goals."

I welcome the debate on this extremely important subject.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-77

In the Matter of	)	
	)	
Southwestern Bell	)	AAD 93-151
Telephone Company	)	

ORDER TO SHOW CAUSE

Adopted: February 24, 1995 Released: March 3, 1995

By the Commission:

1. At the direction of this Commission, the National Exchange Carriers' Association, Inc. ("NECA") hired Ernst and Young to conduct an independent audit of carrier-reported adjustments to the Common Line ("CL") revenue pool for 1988 and the first quarter of 1989.[1] Our subsequent review of that Commission-mandated audit revealed apparent violations of our accounting rules and reporting requirements by Southwestern Bell Telephone Company ("Southwestern") during the audit period. These apparent violations may have continued beyond the period covered by the audit. This Order to Show Cause sets forth those apparent violations and directs Southwestern to show cause why this Commission should not: (1) issue a Notice of Apparent Liability for Forfeiture ("NAL") for apparent violation of Section 220(d) of the Communications Act of 1934, as amended;[2] (2) require Southwestern to adjust its price cap indexes ("PCIs"); and (3) require Southwestern to improve its internal processes to bring them into compliance with Commission rules and orders.

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[1] NECA collects cost data, including revenue, expense and investment data, from all local exchange carriers ("LECs") on a monthly basis. These data are then used to develop LEC-specific revenue requirements which are designed to recover those LEC-incurred costs that are allocated to the interstate jurisdiction under our jurisdictional separations rules, 47 C.F.R. Part 36. The revenue requirement development process is called "pooling," because, initially, all LEC-submitted cost data are combined ("pooled") based on whether they are non-traffic sensitive (e.g., CL) or traffic sensitive ("TS") in nature. Accordingly, NECA administers two revenue pools. Non-traffic sensitive, CL costs are pooled to develop CL revenue requirements, and TS costs are pooled to develop TS revenue requirements. The revenues required to recover CL costs are collected through (1) carrier common line charges billed to the interexchange carriers; (2) subscriber line charges billed to end users and other customers; and (3) surcharges assessed against special access customers. These charges are set forth in tariffs NECA prepares for pool members, primarily the smaller, independent LECs. Other LECs -- including the Bell Operating Companies ("BOCs") -- currently do not participate in the cost recovery pools and, instead, prepare their own access tariffs. As explained infra, however, the pools are calculated based on revenue data provided by all LECs, and revenue data reported to NECA by the large carriers will, therefore, affect the charges of pool members. Moreover, during the time period covered by the audit, our rules required all LECs to participate in the CL pool.

[2] 47 U.S.C. §220(d).

2. Enforcing our accounting rules and reporting requirements is essential for the Commission to carry out its statutory obligations to ensure that rates for telecommunications services remain just and reasonable. Our ability to carry out these obligations is impaired if we cannot rely upon the information that carriers are required to submit about the costs of their operations and their allocations of those costs, or if those allocations are made improperly. As the telecommunications marketplace continues to diversify, with carriers providing more and more nonregulated services, our enforcement of accounting safeguards will become even more important if we are to continue to protect ratepayers from being overcharged for interstate services.

I. Background

3. Our rules require the LECs, on a monthly basis, to report to NECA their revenue, expense and investment data. NECA uses these data to compute each LEC's monthly pool shares.[3] Because LECs do not have complete data available when they first report to NECA, the LECs initially report estimated data. In the following months, the LECs are required to reconcile their estimates with actual results. To ensure the accuracy of the reconciliation process, and because even the best accounting systems sometimes fail to prevent errors, NECA procedures allow the LECs twenty-four months to reconcile and correct previously submitted data. Thus, in each monthly "settlement cycle," LECs report estimated data for the current month as well as adjusted data for the preceding twenty-four months.

4. In the December 1988 settlement cycle, certain LECs reported unusually large adjustments to the CL pool. Commission staff audited the larger of these adjustments and found that they appeared to have been encouraged by NECA Board members representing the BOCs and further found them apparently inconsistent with the Commission's rules. As a result, the Commission issued Notices of Apparent Liability for Forfeiture and Orders to Show Cause against the BOCs that filed these adjustments.[4] The Commission also issued a letter of reprimand to the NECA Board of Directors and required, inter alia, that NECA hire an independent auditor to perform a comprehensive audit of significant adjustments the BOCs reported to the CL pool for 1988 and 1989.[5]

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[3] 47 C.F.R. §69.605.

[4] See, e.g., Southwestern Bell Telephone Co., Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7179 (1990). The Commission subsequently entered into Consent Decrees with the carriers thus resolving these initial actions without determinations of liability. See, e.g., Southwestern Bell Telephone Co., Consent Decree Order, 7 FCC Rcd 7692 (1992).

[5] Letter from Donna R. Searcy, Secretary, FCC, to Lawrence C. Ware, Chairman of the Board of Directors, NECA, 5 FCC Rcd 7183 (1990). The letter identified "significant adjustments" as individual adjustments of $100,000 or more that the BOCs had reported to the CL pool for 1988 and 1989 other than the adjustments that had been addressed in the Commission audit. The independent audit covered the fifteen data months from January 1, 1988 through March 31, 1989, after which time participation in the CL pool became voluntary and all BOCs left that pool. The letter, however, also required that the independent audit "include adjustments reported after [the

5. NECA hired the public accounting firm of Ernst & Young to conduct the independent audit. Ernst & Young issued its report which NECA submitted to the Commission.[6] That report included numerous audit findings against the BOCs, including Southwestern, concerning rule violations and conduct, some of which apparently have continued to the present. These violations could have a substantial impact on the CL pool as well as on the carrier's interstate telecommunications services customers. This is because NECA distributes access tariff revenue based on reported data. Moreover, since the reported adjustments to the CL pool involve misstatements or miscalculations of interstate costs and revenues historically used to develop the reporting carrier's access charges, and, after 1988, its price cap indexes, the reporting carrier's interstate access customers, as well as end users, are affected. Although the independent auditor's report addressed the effects of the BOCs' conduct only on the CL pool, Commission auditors are examining the effect on all interstate telecommunications services. Those of the independent auditor's findings that were directed against Southwestern and that appear to warrant Commission action are the subject of this Order to Show Cause. The findings are summarized below. Attachment A provides the specific details of each finding, the Commission rules that were apparently violated, and the company's response to those findings. Attachment B presents, in tabular form, a summary of the apparent violations and their revenue impacts as revealed by the record to date.

II. The Findings

6. Section 220(a) of the Communications Act grants to the Commission specific authority to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject [to the Act]...."[7] In turn, Section 220(d) authorizes the Commission to impose forfeitures on carriers who do not keep such accounts, records, and memoranda in the manner prescribed by the Commission. The findings noted in Attachment A appear to reveal conduct by Southwestern that violates Section 220 for the period that is the subject of the audit, namely, the period beginning January 1, 1988, and ending March 31, 1989.[8]

BOCs] left the pool on April 1, 1989" since carriers were allowed to submit adjustments for up to twenty-four months following a particular data month. Id. As a result, the independent audit examined reported CL pool adjustments through March 1991.

[6] The Ernst & Young audit report is hereafter referred to as the "Adjustments Report." On February 11, 1993, the Commission concluded that this audit had complied with Commission directives and had been performed "with a high degree of skill and care," and that the independent auditor had "exercised sound professional judgment reflecting purposes of the [audit] and the information gathered during [its] course." See Letter from Donna R. Searcy, Secretary, FCC, to Robert A. McArton, Chairman of the Board of Directors, NECA, 8 FCC Rcd 1315 (1993).

[7] 47 U.S.C. §220(a).

[8] The apparent violations roughly fall into two categories for purposes of potential remedies. First, certain apparent violations found to fall outside the applicable limitations period for assessing forfeitures may, nevertheless, necessitate corrective action by the Commission. For example, the Commission may require adjustments to carrier price cap indexes to eliminate distortions caused by unlawful conduct. Second, other apparent violations, if found

7. The findings that we address here involve the misstatement or miscalculation of $9.7 million of interstate costs and revenues for January 1988 through March 1989.[9] In the aggregate, these misstatements or miscalculations apparently benefited Southwestern to the detriment of the users of Southwestern's interstate services. These misstatements or miscalculations also shifted costs between or among access elements, thus apparently distorting Southwestern's interstate revenue requirements for particular services. The seriousness of the misstatements is compounded here not only because of the net impact and the extent of understatements and overstatements, but also because of the scope of the errors or apparent violations and the fact that some of them may have continued to the date of this Order to Show Cause. The findings reveal Southwestern's apparent failure to maintain its accounts, records, and memoranda in the manner prescribed by the Commission. To the extent that this conduct has continued, it must seriously undermine the Commission's confidence that Southwestern's accounts accurately reflect Commission-mandated accounting practices or reveal the true and lawful costs of Southwestern's interstate services. Moreover, and as explained more fully below, the apparent rule violations and misstatements may very well have led Southwestern to compute price cap indexes that likely would require correction.

8. In the following paragraphs we describe the accounting irregularities that have led to this Order to Show Cause.

A. Apparent Cash Working Capital Violations

9. The independent auditor found six instances in which Southwestern's calculation of its cash working capital allowance apparently violates Commission requirements.[10] At least one of these apparent violations may have continued to the present. Cash working capital allowance is supposed to reflect the average amount of investor-supplied capital needed to fund a carrier's day-to-day operations.[11] This allowance is added to a carrier's rate base, thereby increasing the earnings the carrier is allowed. Some of the six apparent violations are more serious than others. For example, in computing cash working capital, carriers are allowed to add minimum bank

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to be continuing or to have continued into the period covered by the limitations period, could support Notices of Apparent Liability for Forfeiture under Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, as well as support other remedies, such as price cap adjustments.

[9] These figures are based on estimates Southwestern provided to the independent auditor. See Letter from Bruce Baldwin, President, National Exchange Carrier Association, Inc., to Mr. Gerald P. Vaughan, Deputy Chief, Operations, Common Carrier Bureau, at Southwestern Attachment (Oct. 12, 1992)(October 12 Letter). Although the estimates encompass most of the independent auditor's findings, Southwestern did not provide estimates of the impact of certain findings on interstate rates and revenue requirements.

[10] Attachment A, at 1.

[11] See, e.g., American Telephone and Telegraph Company, Docket No. 19129, Phase II Initial Decision, 64 FCC 2d 131, 389-90, paras. 880-87; Phase II Final Decision, 64 FCC 2d 1, 76, para. 194 (1977) (19129 Phase II Final Decision).

balances to the results obtained from their lead-lag studies.[12] Southwestern apparently added average daily ledger balances, rather than minimum bank balances, to its lead-lag study results.[13] Southwestern also used outdated and incomplete studies to determine certain factors used to calculate cash working capital, and it could not locate the studies used to support other such factors.[14]

B. Allowance for Funds Used During Construction

10. Another area of apparent violation is the calculation of Southwestern's allowance for funds used during construction (AFUDC).[15] AFUDC is a regulatory tool used to compensate investors for funds used in construction projects. In the Docket 19129 proceeding, the Commission required AT&T and the Bell System to use the prime rate to compute AFUDC for ratemaking purposes.[16] According to the independent auditor, Southwestern used a rate other than prime to calculate its AFUDC, despite the ruling in Docket 19129.[17]

C. Apparent Jurisdictional Separations Violations

11. Responsibility for regulating telephone services is shared between this Commission, which regulates interstate service, and state commissions, which regulate intrastate service. Carriers must use a process called jurisdictional separations to apportion their costs and revenues between the state and interstate jurisdictions. The separations procedures are set forth in Part 36 of our rules.[18] The independent auditor found that Southwestern improperly separated its investment in wideband and exchange trunk cable and wire facilities.[19]

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[12] See Attachment A, at 1-2. Lead-lag studies measure cash inflows and outflows in relation to the time service is rendered. Revenue and expense items that are received or paid before a service is rendered are considered "lead" items, and revenue and expense items that are received or paid after service is rendered are considered "lag" items. Lead-lag studies determine the number of days between receipt of revenues and payment of expenses.

[13] Attachment A, at 2.

[14] Id. at 4.

[15] AFUDC is synonymous with interest during construction.

[16] The prime rate is usually defined as the lowest rate of interest charged by a lender to its best customers for short-term unsecured loans. The Commission's statement requiring the use of the prime rate is found in the 19129 Phase II Final Decision, 64 FCC 2d at 59-60. We reaffirmed this prime rate-based calculation in our rate base proceeding. See Illinois Bell Telephone Co. v. FCC, 911 F.2d 776, 782-783 (D.C. Cir. 1990) (Illinois Bell I).

[17] Attachment A, at 5-6.

[18] 47 C.F.R. Part 36.

[19] Attachment A, at 6-9.

D. Other Apparent Errors

12. The independent auditor also found a number of other apparent rule violations, including errors in accounting for revenues, various data input errors, and miscalculations involving the adjustments reported to the CL pool.[20] In one of these apparent violations, Southwestern reported, as compensable, inside wiring costs from periods prior to the period covered by the audit, including costs incurred before divestiture.[21] As such errors and other violations accumulate, the data carriers report to NECA under Section 69.605 of our rules[22] and to us under Parts 43 and 65 of our rules[23] become increasingly unreliable. Although these errors may have no current impact on Southwestern's interstate rates, their number and scope persuade us to order Southwestern to show cause why its internal accounting and accounting-related processes should not generally be brought into compliance with Commission rules and orders.

III. Discussion and Conclusion

A. NALs

13. We find that Southwestern's conduct appears to be inconsistent with its statutory obligation to maintain its accounts, records, and memoranda as prescribed by the Commission. Carriers must accumulate, process, and report their financial and operating data in accordance with very specific requirements because we rely on those data to help us ensure that interstate telephone rates are just and reasonable. Moreover, we cannot evaluate how well our accounting rules work if carriers disregard or misinterpret these rules. Therefore, where, as appears to be the case with Southwestern, a carrier either intentionally violates our rules or fails to maintain the internal systems necessary to ensure compliance with those rules, we believe a forfeiture may be appropriate under Section 220 of the Act.

14. Section 220(d) of the Act authorizes us to impose forfeitures of up to $6000 per carrier per day for accounting-related violations.[24] Obviously, any violations that continued throughout the audit period and to the present could trigger substantial forfeiture amounts for Southwestern based on appropriate application of the statute of limitations. In order to make a determination about the amount of any forfeiture that may lie, we direct Southwestern to state when the conduct cited herein and detailed in Attachment A ceased, if ever, and otherwise show

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[20] Id. at 9-12.

[21] Id. at 10-11.

[22] 47 C.F.R. §69.605.

[23] 47 C.F.R. Parts 43, 65.

[24] 47 U.S.C. §220(d). Prior to December 19, 1989, the forfeiture amount was fixed at $500 per violation per day.

cause why notices of apparent liability pursuant to section 1.80 of the Commission's rules should not issue.[25] Southwestern's response should include a discussion of the appropriate application of the prescribed limitations period.[26] Southwestern's response also should identify any mitigating circumstances we should consider in determining forfeiture amounts.[27]

B. Adjustments to Price Cap Indexes

15. As indicated above, Southwestern did not provide estimates of the impact on interstate services rates and revenue requirements of certain conduct described in several of the independent auditor's findings.[28] So that we may assess the full impact of Southwestern's conduct, we order Southwestern to estimate the interstate impact of each of these findings and to file its estimates with the Commission. These estimates shall include the annual effects of the findings on Southwestern's CL, TS, special access, billing and collection, and interexchange costs and revenues for the period 1988 to the public release date of this Order to Show Cause. We also direct Southwestern to provide estimates of the impact on its interstate revenue requirements attributable to all conduct discussed herein and in Attachment A that continued beyond the period of the audit, and to file these estimates with its response. We specifically order Southwestern to provide a revised estimate of the impact of calculating AFUDC at rates other than the prime rate.

16. Since January 1, 1991, the Commission has regulated Southwestern's interstate access charges using the LEC price cap rules.[29] Under these rules, Southwestern's initial price cap indexes were established based upon its projected interstate access revenue requirements for the period July 1, 1990 to June 30, 1991. Southwestern's calculation of those revenue requirements may have reflected the practices detailed in Attachment A. Because, under price cap regulation, each succeeding price cap index for a basket of services is a function of an initial price cap index for that basket, Southwestern's price cap indexes for its interstate services (and, by definition, its interstate rates) would have continued to reflect the impact of any improper

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[25] 47 C.F.R. §1.80.

[26] Section 220(d) provides for forfeitures if a carrier fails to keep its accounts, records and memoranda in the manner prescribed by the Commission. 47 U.S.C. §220(d). Although Southwestern's violation began January 1, 1988, we would assess a forfeiture only for the period allowed for by the limitations period. See 47 C.F.R. §1.80(c)(2).

[27] See 47 U.S.C. §504(b).

[28] See supra note 9. These findings are discussed in paragraphs 10-12, 15-16, and 22-23 of Attachment A.

[29] See Policies and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), Erratum, 5 FCC Rcd 7664 (Com.Car. Bur.1990), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Reconsideration Order), aff'd, National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

practices.[30] Absent Commission action, Southwestern's future indexes would reflect any overstatement as well. Therefore, we order Southwestern to show cause why this Commission should not require it to reduce its current price cap indexes to remove any overstatement.[31]

C. Corrective Action

17. Finally, we tentatively conclude that we should direct Southwestern to improve its internal processes to bring them into compliance with Commission rules and orders, and we order it to show cause why such action should not be required. We will take any additional actions we believe appropriate, including issuing a further Order to Show Cause, based on Southwestern's response.

IV. Ordering Clauses

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 220(d), and 504(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 220(d), & 503(b), and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why Notices of Apparent Liability for Forfeiture should not issue for failure to keep its accounts, records, and memoranda on the books and in the manner prescribed by the Commission as set out in this Order to Show Cause, including Attachments A and B which are hereby incorporated by reference, and therewith SHALL FILE any and all data and other information required by this Order to Show Cause, including information requested in Attachment A.

19. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j) 201-03, 205, 215, 217-19, & 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL FILE within sixty (60) days of the release date of this Order to Show Cause interstate cost and revenue impact estimates and supporting detail as specified in paragraph 14, supra.

20. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, & 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within sixty (60)

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[30] See 47 C.F.R. §§61.44(b), 61.45(b)-(c).

[31] To achieve this, Southwestern would need to reduce its price cap indexes by the percentage change in its July 1, 1990 to June 30, 1991 projected interstate access revenue requirement that results from the removal of any overstatement. These reductions to the price cap indexes would need to be apportioned among the baskets based on the relative July 1, 1990 to June 30, 1991 projected interstate access revenue requirements in each basket.

days of the release date of this Order to Show Cause why it should not be required to adjust its price cap indexes as specified in paragraph 15, supra.

21. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201-203, 205, 215, 217-219, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), 201-03, 205, 215, 217-19, and 220, and Section 1.701 of the Commission's rules, 47 C.F.R. §1.701, that Southwestern Bell Telephone Company SHALL SHOW CAUSE within sixty (60) days of the release date of this Order to Show Cause why it should not be required to improve its internal processes to bring them into compliance with Commission rules and orders.

22. IT IS FURTHER ORDERED that the Secretary shall send by certified mail a copy of this Order to Show Cause to the Southwestern Bell Telephone Company, One Bell Center, St. Louis, Missouri 63101.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment A

1. We present below the apparent violations of Southwestern based on the findings in the Ernst & Young report that prompt us to issue the accompanying Order to Show Cause. For each apparent violation, we summarize the independent auditor's finding and any Southwestern reply. We also present our preliminary evaluation of the record. In general, the violations are categorized according to the ratemaking component affected. This attachment separates the apparent violations into the following categories: cash working capital, allowance for funds used during construction, jurisdictional separations, and other apparent errors. In attachment B, we present the information in the record on the impact of these apparent violations on Southwestern's interstate revenue requirement for the fifteen-month audit period.

A. Cash Working Capital

2. We find six instances in which Southwestern's calculation of cash working capital allowances appears to have violated Commission requirements. Specifically, Southwestern's development of those allowances may have violated Sections 65.800 and 65.820(d) and (e) of the Commission's rules, which instruct carriers on how to calculate the interstate rate base.[1] As a result of its cash working capital calculations, Southwestern has been reporting incorrect information to NECA in apparent violation of Section 69.605 of the rules[2] and to the Commission in apparent violation of Section 65.600 of the rules.[3] Finally, to the extent this information has been reported in the Commission's automated database, Automated Reporting Management Information System (ARMIS), Southwestern appears to have violated Section 43.21 of the rules, which requires that data filed in ARMIS be accurate, complete, and responsive, and certified as such by a senior carrier officer.[4]

3. The elements of lead-lag studies to calculate cash working capital were set forth in Docket No. 19129[5] and reaffirmed in rate base proceeding Docket No. 86-497.[6] Lead-lag

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[1] 47 C.F.R. §§65.800, 65.820(d)-(e). These rules require carriers, like Southwestern, to calculate the cash working capital component of their interstate rate base either by performing a lead-lag study of interstate revenue and expense items or by applying a specified formula. Southwestern elected to perform a lead-lag study.

[2] 47 C.F.R. §69.605.

[3] 47 C.F.R. §65.600. In these rate of return reports to the Commission, Southwestern is required to "provide full and specific answers to all questions propounded and information requested...." 47 C.F.R. §65.600(b), (d)(1).

[4] 47 C.F.R. §43.21(a).

[5] American Telephone & Telegraph Co., Docket No. 19129, Phase II Final Decision, 64 FCC 2d 1, 72-73, para. 187 (1977) (19129 Phase II Final Decision), aff'g Phase II Initial Decision, 64 FCC 2d 131 (1976) (19129 Phase II Initial Decision).

studies measure cash inflows and outflows in relation to the time service is rendered. Revenue and expense items that are received or paid before a service is rendered are considered "lead" items, and revenue and expense items that are received or paid after service is rendered are considered "lag" items.[7] Lead-lag studies determine the number of days between receipt of revenues and payment of expenses. The net number of revenue lag days is then multiplied by the average daily cash expenses to determine cash working capital.[8] A positive net lag results in a positive cash working capital allowance, which increases the rate base; a negative one results in a negative allowance, which reduces the rate base.[9] In previous orders, we have set forth the specific requirements for the inclusion and exclusion of various items in cash working capital calculations, but the general rule is that the net lead or lag is applied to the average daily cash expenses. The specifics of these six apparent violations are discussed below.

4. **Apparent Violation No. 1:** In computing cash working capital allowances, carriers are allowed to add minimum bank balances to the results obtained from lead-lag studies. The independent auditor found that Southwestern instead used average daily ledger balances in this computation.[10] The independent auditor estimated that this practice resulted in a $2,170,000 overstatement in Southwestern's interstate revenue requirement for January 1988 through March 1989.[11]

5. Southwestern took its average daily ledger balances from Account 1130, Cash. Southwestern asserts that account does not reflect the average balance of Southwestern's available cash, but reflects the average minimum daily cash amount necessary to meet Southwestern's day-to-day operating expenses and is properly included in the rate base. Southwestern states that it maintains the minimum amount of funds to cover the vouchers issued for its daily operations without incurring bank fees and overdraft charges. Southwestern contends that it incurred bank service charges of over $2.9 million in 1988 to cover overdrafts, which proves that these balances are not excessive. Additionally, Southwestern contends that

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[6] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, CC Docket No. 86-497, Report and Order, 3 FCC Rcd 269 (1987) (86-497 Order), recon. 4 FCC Rcd 1697 (1989) (86-497 Reconsideration Order), remanded sub nom. Illinois Bell Telephone Co. v. FCC, 911 F.2d 776 (D.C. Cir. 1990) (Illinois Bell I), on remand, 7 FCC Rcd 296 (1991) (84-497 Decision on Remand), affirmed sub nom. Illinois Bell Telephone Co. v. FCC, 988 F.2d 1256 (D.C. Cir. 1993) (Illinois Bell II).

[7] Related terms include "expense lag" (the average net lag of all of a carrier's cash expenses); "revenue lag" (the average net lag of a carrier's revenues); and "net lag" (the net of a carrier's expense lag and revenue lag).

[8] 86-497 Decision on Remand, 7 FCC Rcd at 297, para. 9.

[9] Annual 1990 Access Tariff Filings, Memorandum Opinion and Order, 5 FCC Rcd 4177, 4219 (1990).

[10] Adjustments Report at 85.

[11] Letter from Bruce Baldwin, President, National Exchange Carrier Association, Inc., to Mr. Gerald P. Vaughan, Deputy Chief, Operations, Common Carrier Bureau, Southwestern Attachment at 1 (October 12, 1992)(October 12th Letter).

its methodology has been reviewed and audited both internally and externally without challenge.[12]

6. Southwestern further argues that the Commission accepted its definition of minimum bank balance in Docket No. 16258.[13] In that case, the Commission stated that "it is recognized that each of these [AT&T] accounts must maintain a balance in order to avoid bank charges and . . . because there are fluctuations in the day-to-day needs for payments of operating expenses, additional amounts in the cash accounts are required for peak requirements."[14]

7. We disagree with Southwestern that minimum bank balance means the minimum amount required to meet operating needs. In Docket 19129, the Commission determined that carriers should include minimum bank balances and working cash advances in cash working capital calculations.[15] The purpose behind including minimum bank balances is to protect carriers from loss of a return if their money is encumbered because of a bank requirement. The purpose is not to allow carriers to earn a return on whatever money they may have in the bank based on cash management techniques.[16] In defining minimum bank balances, the Commission stated that they are balances "maintained in an account to compensate banks, in lieu of fees, for services provided to that account."[17] The Commission also stated that carriers should use minimum bank balances because they constitute cash amounts that must be maintained in addition to the cash flows that are considered in the lead-lag studies. It further stated that "[n]o other cash balances are allowed in the rate base."[18] This prohibition extends to carriers adding cash balances, i.e., amounts over and above minimum bank balances and working cash advances

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[12] Adjustments Report at 86-87.

[13] Id. at 86.

[14] AT&T and the Associated Bell System Companies Charges for Interstate and Foreign Communications Service, Docket No. 16258, Interim Decision and Order, 9 FCC 2d 30, 46 (1967).

[15] 19129 Phase II Final Decision, 64 FCC 2d at 76, para. 195; id. at 409, para. 905; accord 86-497 Reconsideration Order, 4 FCC Rcd at 1698, 1699, paras. 17, 22.

[16] The ALJ emphasized that:

> working capital is intended to provide only for the current day-to-day needs of the business and not for any of the capital requirement. Second, working capital is the amount of dollars that are necessary to meet current needs, not the amount of dollars that a public utility would like to have on hand or might actually have on hand.

Docket 19129 Initial Decision, 64 FCC 2d at 403, para. 881.

[17] Docket 19129 Phase II Final Decision, 64 FCC 2d at 76, para. 195 n.102.

[18] 86-497 Reconsideration Order, 4 FCC Rcd at 1698-99, para. 17.

to the cash working capital.[19] Thus, Southwestern's practice of adding items to its cash balance, such as cash needed for vouchers left in the account before the check is cashed, is an apparent violation of our rules.

8. Apparent Violation No. 2: On February 22, 1989, we released the 86-497 Reconsideration Order,[20] which reiterated our requirement that minimum bank balances, rather than average bank balances, be used to compute cash working capital. The independent auditor found that in Oklahoma Southwestern took six months to correct its cash working capital calculations to reflect that Order by reporting a retroactive adjustment to NECA.[21] Southwestern contends that its retroactive adjustment was well within NECA's guidelines, which allow up to twenty-four months to adjust data.[22] Southwestern asserts that because this adjustment was made retroactively, there was no effect on the CL pool.[23]

9. It is true that NECA allows carriers twenty-four months to make retroactive adjustments. As a general policy, however, we expect carriers to correct erroneous data as soon as possible. Because Southwestern corrected this apparent violation, we propose to take no action beyond adjustments to Southwestern's price cap indexes that may be required to correct for any impact the erroneous calculations have had on the levels of those price cap indexes.

10. Apparent Violations Nos. 3 through 6: The independent auditor made four additional findings regarding Southwestern's cash working capital calculations. First, the independent auditor found that Southwestern used outdated lead-lag factors for revenue and tax that were based on numbers developed prior to 1985, some dating back to 1981.[24] Second, the independent auditor found that, in Missouri, Southwestern did not review data from at least a three-month period when it developed the coin box revenue lag factor in the lead-lag study.[25] Third, the independent auditor stated that Southwestern could not locate the studies used to develop federal excise tax and excise taxable revenue for Southwestern's Texas operations.[26] Fourth, the independent auditor found that the factors Southwestern used to determine the portion of Account 1220, Materials and supplies, that could be included in the interstate rate

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[19] Id. at 1698-99, para. 22.

[20] 4 FCC Rcd at 1697.

[21] Adjustments Report at 86

[22] Id.

[23] Id. at 87.

[24] Id. at 83.

[25] Id.

[26] at 84.

base did not agree with, and were more favorable to Southwestern than, those in Southwestern's supporting documentation.[27] The independent auditor was unable to calculate the impact on interstate revenue requirements attributable to the first three findings. With regard to the fourth, the independent auditor estimated that Southwestern's practice understated Southwestern's CL and interstate revenue requirements for January 1988 through March 1989 by $107,000 and $153,000, respectively.[28]

11. Southwestern agrees with these findings. While accepting the independent auditor's $107,000 CL estimate for the fourth finding, Southwestern estimates that the CL revenue requirement impact of each of the first three findings was less than $100,000.[29]

12. These findings make clear the inadequacy of Southwestern's procedures for determining cash working capital. First, much happened to change Southwestern's operations between the period on which the revenue and tax factors used in its lead-lag study (1981 to 1985) were based and the audit period (January 1988 through March 1989). Southwestern's reliance on lead and lag factors from the earlier period is inconsistent with its obligation to ensure that its cash working capital calculations reflect current needs. In addition, Southwestern's failure to follow internal company procedures in Missouri; its inability to locate studies used to determine the cash working capital allowance in Texas; and its use of inaccurate factors for determining the portion of its materials and supplies that could be included in the interstate rate base make clear that Southwestern apparently did not have sufficient controls in place to ensure implementation of our cash working capital requirements.

B. Allowance for Funds Used During Construction

13. **Apparent Violation No. 7:** In the Docket 19129 proceeding, the Commission specified that, for ratemaking purposes, AT&T and the Bell System use the prime rate to compute the allowance for funds used during construction (AFUDC) of long-term projects.[30] The independent auditor found that Southwestern had calculated AFUDC using a cost of capital rate. The independent auditor also found that, in October and November 1988, Southwestern reported AFUDC adjustments to NECA to implement the Part 65 rate base and net income determination rules for dominate carriers that had taken effect on January 1, 1988.[31] The independent auditor stated that because Southwestern's cost of capital exceeded the prime rate during this period, "the calculated adjustment rate should have been a negative amount, rather

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[27] Id.

[28] Id.

[29] Id.

[30] 19129 Phase II Final Decision, 64 FCC 2d at 59-60. AFUDC is synonymous with interest during construction.

[31] 86-497 Order, 4 FCC Rcd 269 (987).

than [the] positive one" Southwestern used.[32] According to the independent auditor, this error overstated Southwestern's interstate revenue requirements for 1988 by $2,367,000.[33]

14. Southwestern admits that it erred in how it calculated the AFUDC adjustments. As a result of that error, Southwestern increased its interstate rate base by the amount that rate base should have decreased. Southwestern states that on September 13, 1991, it instructed all its study areas "to complete a 'catch-up' calculation on an off-line basis for each month from the date of the error to the present time and correct Southwestern Bell records on a going-forward basis."[34]

15. Because Southwestern had used a rate other than the prescribed rate in computing AFUDC, Southwestern acted correctly in reporting AFUDC adjustments to NECA. Nonetheless, we have two concerns regarding those adjustments. First, neither the independent auditor nor Southwestern has made clear whether these adjustments corrected AFUDC calculations for periods prior to 1988, as well as for 1988.[35] Absent the correction of prior AFUDC calculations, Southwestern's interstate rate base, depreciation expense, and interstate revenue requirement would continue to be overstated. To ensure that Southwestern's interstate rate base is accurate, the accompanying Order to Show Cause requires Southwestern to provide a revised estimate of the impact on that rate base of calculating AFUDC at rates other than the prime rate.

16. Second, Southwestern's description of its 'catch-up' calculation does not state whether Southwestern reported adjusted investment amounts to the CL pool to reflect that calculation. That description also does not state what additional steps, if any, Southwestern took to implement that calculation and correct the reports it had filed with the Commission. Southwestern shall describe in detail all steps it took to report investment based on correct AFUDC amounts to the Commission and NECA.

C. Jurisdictional Separations

17. **Apparent Violation No. 8:** Effective January 1, 1988, the Commission adopted Section 36.142(a) of the rules,[36] which requires certain carriers, including Southwestern carriers,

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[32] Adjustments Report at 87.

[33] October 12 Letter, Southwestern Attachment at 1.

[34] Adjustments Report at 87-88.

[35] The independent auditor's reference to "this period" in its finding suggests that Southwestern may not have attempted to correct prior AFUDC calculations.

[36] 47 C.F.R. §36.142(a).

to apportion all information origination/termination (IOT) equipment costs,[37] other than those for coinless pay telephone equipment and detariffed customer premises equipment, between the federal and state jurisdictions using the transitional subscriber plant factor.[38] Section 69.303(b) of the Commission's rules, in turn, requires LECs to apportion the interstate portion of that investment between the special access and CL elements "on the basis of the relative number of equivalent lines in use."[39]

18. The independent auditor found that in 1988 Southwestern initially assigned IOT investment directly to special access services. The independent auditor also found that by October 1988 Southwestern had reversed this direct assignment retroactive to January 1, 1988 in Arkansas, Kansas, Missouri, and Oklahoma. In Texas, however, Southwestern did not reverse this direct assignment for January 1988 through June 1988.[40] The independent auditor stated that this failure in Texas understated Southwestern's CL costs by $538,000, understated Southwestern's traffic sensitive costs by $69,000, and overstated Southwestern's special access costs by $1,719,000, for a net total interstate overstatement of $1,112,000.[41] Southwestern states that its Texas operation misunderstood a directive from Southwestern's headquarters, but corrected the direct assignment on a going-forward basis beginning in July 1988.[42]

19. Because Southwestern's direct assignment of IOT investment to the special access category was inconsistent with Sections 36.142(a) and 69.303(b), Southwestern concluded that it should reverse that direct assignment retroactive to January 1, 1988 throughout its service area. Southwestern's failure to implement that reversal in Texas continued its apparent violation of those rules for this study area. However, because Southwestern stopped assigning IOT investment directly to special access services in July 1988, we propose no further action on this matter at this time.

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[37] IOT equipment consists of electronic devices and supporting equipment used to originate and terminate telecommunication messages at the end users' premises. See 47 C.F.R. Part 36, Appendix. It includes station apparatus such as telephone and miscellaneous equipment, teletypewriter equipment, small private branch exchanges, and radio equipment (excluding mobile) installed for the end users' use. It also includes embedded customer premise wiring, large private branch exchanges, public telephone terminal equipment, and other terminal equipment. See 47 C.F.R. §36.141(a).

[38] The subscriber plant factor was formerly used to allocate to interstate operations certain investment in plant; subscriber lines, station equipment, and a portion of central office switching used for message telephone service. Each company's subscriber plant factor was frozen at its 1981 average level and then phased into a nationwide basic allocation factor of 25% over eight years beginning January 1, 1986. Thus, the subscriber plant factor became known as the "transitional subscriber plant factor" during the phase-in period. 47 C.F.R. §36.154(c)-(f).

[39] 47 C.F.R. §69.303(b).

[40] Adjustments Report at 88.

[41] October 12 Letter, Southwestern Attachment at 1.

[42] Adjustments Report at 89.

20. **Apparent Violation No. 9:** Section 36.153 of the Commission's rules[43] prescribes how carriers are to assign the cost of cable and wire facilities (C&WF) to separations categories. The independent auditor found that Southwestern did not follow this rule for its Texas study area. The separations procedures used in the Texas study area did not identify the C&WF investment that could be directly assigned to Category 2, Wideband and Exchange Trunk C&WF, but calculated this investment using an allocator. According to the independent auditor, Southwestern discovered this inconsistent treatment for the Texas study area twenty-four months after issuing internal company guidelines. The independent auditor stated that Southwestern corrected the data months April 1988 through March 1989, but was unable to correct the data months January 1988 through March 1988, because NECA's twenty-four month window for corrections had closed.[44] Southwestern agrees with this finding. The independent auditor estimates that Southwestern overstated its CL, TS, and interexchange revenue requirements by $12.000, $4,000, and $5,000 and understated its special access and total interstate revenue requirements by $43,000 and $22,000.[45]

21. We find Southwestern's performance in this instance mixed. While Southwestern moved expeditiously to correct the error once found, it took Southwestern two years to discover it. Consequently, the error could not be completely corrected. Both the error and the delay in detecting it show that Southwestern's internal controls functioned inadequately in these instances. Because Southwestern apparently ceased this violation of Section 36.153 as of March 1990, however, we propose no further action on this matter at this time.

22. **Apparent Violation No. 10:** Separation rules divide cable and wire facilities into four categories and prescribe different rules for apportioning the costs in each category between the state and interstate jurisdictions.[46] Section 36.155 of our rules[47] specifies that the costs in category 2, wideband and exchange trunk cable and wire facilities, be directly assigned, where feasible. Where direct assignment is not feasible, Section 36.155 specifies that the costs are to be apportioned between the state and interstate jurisdictions on the basis of the relative number of minutes of use for each jurisdiction. To determine relative number of minutes of use, LECs, including Southwestern, perform periodic studies that sample the volume and duration of different types of calls during selected periods. Then, each month, the LECs apply the average minutes per call (referred to as a basic study factor) to the current message volume for that type of call to calculate the monthly minutes of use by type of call. These minutes of use figures are then used to develop percentages that are, in turn, applied to the category 2 cable and wire investment, for which direct assignment is not feasible, to separate it between the state and

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[43] 47 C.F.R. §36.153.

[44] Adjustments Report at 94-95.

[45] Id.; October 12 Letter, Southwestern Attachment at 2.

[46] 47 C.F.R. §36.151.

[47] 47 C.F.R. §36.155.

interstate jurisdictions.

23. The independent auditor found that Southwestern did not include feature group B or feature group D message volumes[48] in the development of its basic study factors for the investment in category 2, wideband and exchange trunk cable and wire facilities.[49] In computing the interstate and state jurisdictional amounts, Southwestern applied these basic study factors to message volumes that did include feature group B usage for the Kansas and Texas study areas and feature group D usage for the Oklahoma study area. Southwestern acknowledges these errors, but did not provide estimates of their impact. The original adjustment reduced Southwestern's CL revenue requirement by $1,019,000. We find that Southwestern's conduct apparently violated Section 36.155, and we instruct Southwestern to determine the revenue requirement impact of this apparent violation.

D. Other Apparent Errors

24. **Apparent Violation No. 11:** Presubscription revenues are revenues generated when end users predesignate interexchange carriers as their primary interexchange carrier. The independent auditor found that Southwestern included presubscription revenues in Account 5081, End user revenue, in violation of Section 32.5081 of the Commission's rules.[50] The independent auditor also found that Southwestern's treatment of these revenues did not follow NECA's reporting procedures, which require carriers to include presubscription revenue in the traffic sensitive pool.[51] Part 69 assigns Account 5081 to the CL rate element. Thus, Southwestern's assigning the presubscription revenue to Account 5081 increased the CL pool revenues by $2,046,000 and decreased the traffic sensitive pool revenues by the same amount for the fifteen month period from January 1988 to March 1989, according to the independent auditor.

25. Southwestern asserts that it correctly interpreted the Commission's rules and did not violate them by reporting presubscription revenue to the CL pool. Southwestern states that

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[48] Feature groups describe the various access arrangements that LECs offer IXCs to connect with their local exchange networks. Feature group A provides IXCs, other than AT&T, access to the local exchange network through a local subscriber line. It requires the end user to dial a local exchange number before placing a long distance call. The local number can vary with the locality. Feature group B is similar to feature group A, but provides access through a trunk connection instead of a local subscriber line. It requires the end user to dial a uniform 950-XXXX access code before placing a long distance call. Feature group C is the access arrangement provided to AT&T where feature groups A and B are offered to other IXCs. Of these three feature groups it is the most desired arrangement, because it requires the end user to dial the least number of digits. Feature group D is the most prevalent access arrangement today offering all IXCs the same type of connection (equal access) to the local exchange network. It only requires the end user to dial 1 plus the area code and number.

[49] Adjustments Report at 91-92.

[50] Id. at 78.

[51] Pool Administrative Procedures (Cost Company), Section 5, Traffic Sensitive Pool and Lifeline Assistance Reporting, 42. (Oct. 1990).

Account 5081 includes revenue from interstate monthly flat rate charges assessed upon end users. Southwestern contends that presubscription revenues are also interstate charges assessed upon end users and consequently should be included in this account. Southwestern admits that the latter interstate charges are not monthly charges, as required by Account 5081, but contends that there is no other access revenue account in Part 32 that is appropriate for recording these revenues. According to Southwestern, the only accounts available are for recording switched access revenues and special access revenues derived from rates charged primarily to interexchange carriers.[52]

26. Southwestern also asserts that the Commission's rules do not define access categories for presubscription revenues or explain to which account they should be assigned. Southwestern explains its interstate access tariff (FCC Tariff 68) does not classify presubscription as either common line or traffic sensitive. Similarly, Southwestern maintains that costs related to presubscription charges are not specifically identified in the separations and access cost allocation processes. According to Southwestern, costs associated with presubscription services, such as local office expense and network operations expense, are allocated among all access service categories. Therefore, Southwestern argues that presubscription costs could be recovered from any or all of access rate elements.[53]

27. The language of Section 32.5081 does not support Southwestern's interpretation, which would include these revenues in Account 5081, and eventually assign them to the CL pool. Section 32.5081 provides that:

> §32.5081 End user revenue. This account shall contain the federally tariffed monthly flat rate charge assessed upon end users.[54]

Under this section, Account 5081 contains the revenue generated by the federally tariffed monthly flat rate charge assessed upon end users under §69.104.[55] Account 5081 was established to identify and monitor the revenue from this charge.[56] Thus, Account 5081 does not include additional amounts, like presubscription revenues, even though they are tariffed amounts charged to end users. Presubscription revenues relate to the switched message toll

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[52] Adjustments Report at 78.

[53] Id. at 79.

[54] 47 C.F.R. §32.5081.

[55] 47 C.F.R. §69.104.

[56] Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies of the Commission's Rules and Regulations and conforming amendments to Annual Report Form M and FCC Report 901, CC Docket No. 83-1347, Report and Order, 99 FCC 2d 58, 59 (1984).

service, and carriers must include them in Account 5082, Switched access revenue,[57] which is assigned to the traffic sensitive element as miscellaneous service revenues. Accordingly, we find apparent violations of Sections 32.5081 and 32.5082 of our rules.

28. Apparent Violation No. 12: In the First Report and Order in CC Docket No. 79-105, the Commission required carriers to expense inside wiring costs and to amortize all previously capitalized inside wiring costs over a ten-year period.[58] In February 1988, the Common Carrier Bureau's Accounting and Audits Division (Division) directed Southwestern to forecast its annual inside wiring amortization expenses through the end of the amortization period, which was December 31, 1992.[59]

29. The independent auditor found that in early 1988, Southwestern revised its amortization schedules for inside wiring in response to the Division's inquiry. The independent auditor stated that the revised schedules included "corrections of past accounting errors related to special services" and "approximately $17 million in investment associated with the purchase of property from Mountain Bell which had not been amortized on the Company's books since 1981, when it was originally purchased."[60] The independent auditor stated that, in April 1989 and June 1989, Southwestern reported retroactive adjustments to NECA for these accounting errors. The independent auditor stated that these adjustments resulted in the inclusion of inside wiring costs from prior periods in the CL pools for 1988 and 1989, including costs from periods before divestiture.[61]

30. Southwestern agrees that there was an error in the amortization schedule it submitted to the Commission, and states that, although it corrected that schedule, it did not analyze the reason for the corrections until 1989. At that time, it became aware that the error resulted from its failure to amortize the inside wiring investment it had purchased from Mountain Bell. Southwestern states that it then made a correcting journal entry and reported corresponding retroactive adjustments to NECA.[62] The independent auditor estimated that inclusion of these past period amortization and depreciation expenses increased Southwestern's CL revenue requirement by $1,500,000, while decreasing the traffic sensitive revenue requirement by $101,000, the special access revenue requirement by $18,000, the billing and collection category

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[57] 47 C.F.R. §32.5082.

[58] Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, First Report and Order, CC Docket No. 79-105, 85 FCC 2d 818, 828-29 (1981).

[59] Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, FCC to Karen S. Rogers, Federal Regulatory, Southwestern Bell Corp. (Feb. 12, 1988).

[60] Adjustments Report at 80.

[61] Id. at 79-80.

[62] Id. at 80.

by $31,000, and the interexchange category by $18,000. The net increase in the interstate revenue requirement was $1,332,000.[63] We find that Southwestern may have violated Section 32.25 of our rules, which requires carriers to submit certain prior period adjustments to the Commission for review before recording them in the books of account. We also find that Southwestern apparently drew too much from the CL pool.

31. **Apparent Violations Nos. 13, 14, and 15:** Section 69.605 of the Commission's rules[64] pertains specifically to the reporting and distribution of NECA pool access revenues. It requires LECs to report accurate access revenue and cost data to NECA for monthly pool distributions. The following findings identify discrepancies between data reported to NECA and data in Southwestern's accounts, records, and memoranda.

32. First, the independent auditor found that Southwestern made several input errors when computing the data month adjustments for the October 1988 (Arkansas) and the December 1988 (Oklahoma) data months. The amounts for certain accounts included in the adjustment calculations did not match the amounts for those accounts recorded in the general ledger. The most significant errors involved Account 7220, Operating federal income taxes, which was overstated by $3,554,693; Account 7230, Operating state and local income taxes, which was overstated by $670,564; and Account 7250, Provision for deferred operating income taxes-net, which was understated by $2,100,000.[65] Collectively, the input errors increased Southwestern's interstate revenue requirement by $1,460,000.[66]

33. Second, the independent auditor found that Southwestern incorrectly calculated revenue adjustments reported to the CL pool.[67] According to the independent auditor, Southwestern omitted a manual journal entry from its 1988 data month adjustments for the Missouri study area that would have increased revenues reported to the CL pool by $199,000. Southwestern also miscalculated an adjustment reported to the CL pool to reflect revised revenue figures for the Kansas study area based on later usage data.[68] Southwestern should have reduced the revenues by $168,957. Instead it reduced them by $354,502, a difference of $185,545. These revenue errors increased by $385,000 the interstate revenue requirement on which Southwestern's draw from the NECA CL pool was based.[69]

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[63] October 12 Letter, Southwestern Attachment at 1.

[64] 47 C.F.R. 69.605.

[65] Adjustments Report at 90.

[66] October 12 Letter, Southwestern Attachment at 2.

[67] Adjustments Report at 89.

[68] Id.

[69] October 12 Letter, Southwestern Attachment at 2.

34. Third, the independent auditor found that Southwestern incorrectly calculated an adjustment reported to the NECA CL pool to reflect incentive compensation awards. For the Arkansas study area, Southwestern reversed an estimated accrual for 1988 incentive compensation awards in preparation for recording the actual amounts. In processing this adjustment through Southwestern's separations information system, Southwestern treated it as a monthly amount instead of an annual amount, thus understating expenses.[70] This error decreased Southwestern's interstate revenue requirement by $679,000.[71]

35. Southwestern offered no explanation or arguments regarding any of these findings. We find that these discrepancies in the data Southwestern reported to NECA were inconsistent with Southwestern's obligation to ensure the accuracy of that data and are apparently violations of Section 69.605.

36. Moreover, these errors suggest that Southwestern's internal controls apparently failed to function properly in multiple instances. As a result of such errors, it may be necessary to require adjustments to Southwestern's price cap indexes and take other remedial action depending upon our review of the additional information we have directed Southwestern to submit.

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[70] Adjustments Report at 93-94.

[71] October 12 Letter, Southwestern Attachment at 2.

SOUTHWESTERN BELL - Summary of Apparent Violations

INTERSTATE REVENUE REQUIREMENT
OVERSTATEMENT FOR THE AUDIT PERIOD (See Note)
($000)

	COMMISSION FINDING	CARRIER	TOTAL	COMMON LINE	OTHER INTERSTATE ACCESS ELEMENTS
1.	Used average daily cash balances instead of minimum bank balances to compute CWC.	Southwestern	2,170	1,026	1,144
2.	Delayed correction of CWC calculation.	Southwestern		Unknown	
3.	Used outdated lead-lag studies.	Southwestern		Unknown	
4.	Inadequate analysis in development of the lag factor for coin box revenues.	Southwestern		Unknown	
5.	No documentation for federal excise tax and the federal excise taxable revenue entries.	Southwestern		Unknown	
6.	Used erroneous disallowance factors for materials and supplies.	Southwestern	(153)	(107)	(46)
7.	Did not use prime rate to calculate AFUDC.	Southwestern	2,367	1,094	1,273
8.	Direct assignment errors for IO/T.	Southwestern	1,112	(538)	1,650
9.	Followed erroneous procedures for calculating C&WF, Cat. 2.	Southwestern (Texas)	(22)	12	(34)
10.	Erroneous jurisdictional separations studies for Cat. 2 C&WF.	Southwestern (Oklahoma, Kansas, and Texas)		Unknown	
11.	Erroneously reported PICC revenues to common line.	Southwestern	0	(2,046)	2,046

SOUTHWESTERN BELL - Summary of Apparent Violations

INTERSTATE REVENUE REQUIREMENT
OVERSTATEMENT FOR THE AUDIT PERIOD (See Note)
($000)

	COMMISSION FINDING	CARRIER	TOTAL	COMMON LINE	OTHER INTERSTATE ACCESS ELEMENTS
12.	Reported erroneous inside wire depreciation expenses and reserves.	Southwestern	1,332	1,500	(168)
13.	Numerous erroneous account balances were reported to NECA.	Southwestern	1,460	459	1,001
14.	Omission of revenue journal entry.	Southwestern	385	385	0
15.	Reported erroneous adjustment regarding incentive compensation awards.	Southwestern	(679)	(365)	(314)

Note: Overstated expenses are indicated by positive amounts.
Understated expenses are indicated by negative (parentheses) amounts.
Overstated revenues are indicated by negative (parentheses) amounts.
Understated revenues are indicated by positive amounts.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-99

In re Application of	)	
	)	
SAM JONES, JR., SUCCESSOR LIQUIDATOR FOR FORWARD OF KANSAS Assignor	)	
	)	File Nos. BAL-930126ED
and	)	BALH-930126EE
	)	
EAGLE COMMUNICATIONS, INC. Assignee	)	
	)	
For Assignment of Licenses of KVGB(AM)/KVGB-FM Great Bend, Kansas	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1995 **Released:** March 9, 1995

By the Commission: Commissioner Barrett concurring and issuing a statement.

1. The Commission has before it for consideration the above-captioned application for consent to assign the licenses of KVGB(AM)/KVGB-FM, Great Bend, Kansas, from Sam Jones, Jr. ("Jones"), successor liquidator for Forward of Kansas, Inc. ("Forward") to Eagle Communications, Inc.("Eagle").[1] Letters opposing this transaction were filed on October 4, 1993 by Delia and James P. West, Patricia and Charles Blackburn, Jeremy Shook and Kent Dietz, collectively, on August 23, 1994 by Georgia Dietz, and on December 21, 1994 by Lyman James. Additionally, we have received a number of identical letters objecting to the sale based on the combined audience share of the proposed co-owned stations. These letters will be treated as informal objections

[1] We note that on February 18, 1993, the staff granted an application for an involuntary transfer of the licenses of KVGB(AM)/KVGB-FM from Forward of Kansas, Inc., Debtor-in-Possession, to Sam Jones, Jr., Successor Liquidator for Forward of Kansas, Inc., File No. BTC-930126EA. Although the stations are involved in a bankruptcy proceeding, they are being operated by the liquidator and have not been off the air.

pursuant to 47 C:F.R. § 73.3587.[2]

2. Eagle is the licensee of: KHAZ(FM) and KAYS(AM), Hays, Kansas; KHOK(FM), Hoisington, Kansas; and KHUT(FM) and KWBW(AM), Hutchinson, Kansas. [Figure 1 depicts the relative positions of the principal community contours of the proposed co-owned stations, but is not drawn to scale.]

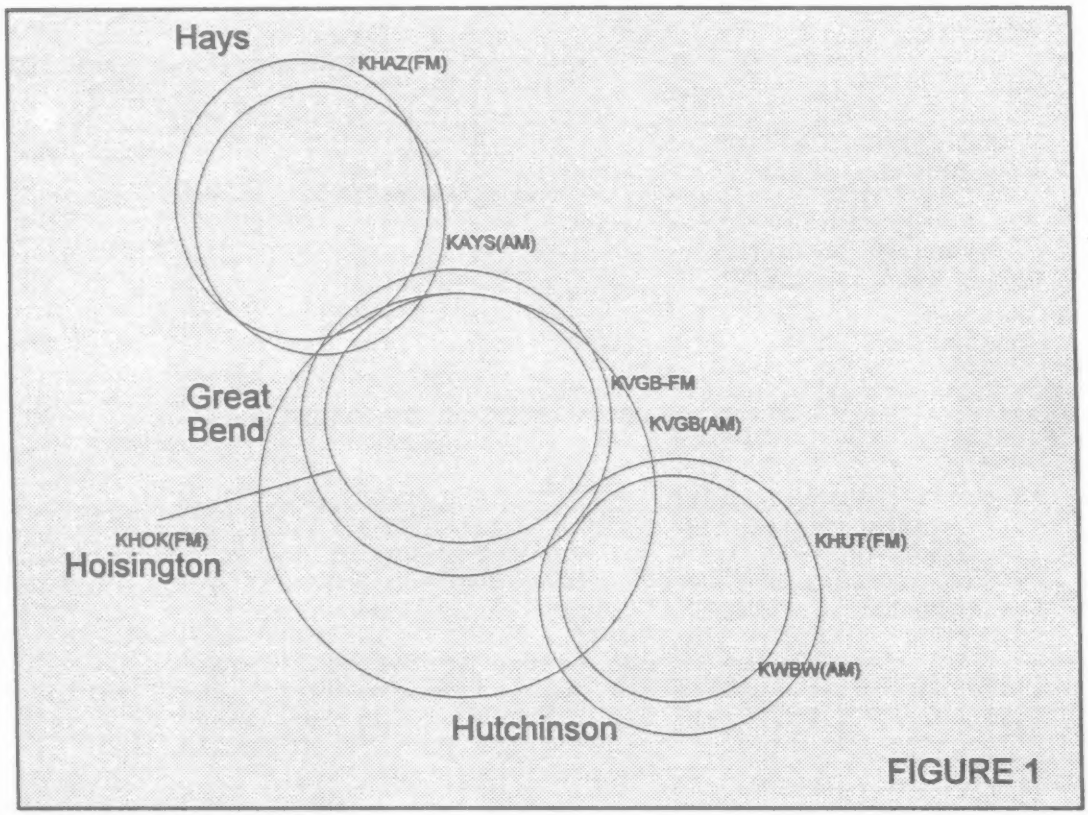

FIGURE 1

[2] These letter pleadings do not comply with the requirements for formal petitions to deny set forth in 47 U.S.C. § 309(d)(1) because they fail to include showings to demonstrate the status of the objectors as parties-in-interest with standing to contest the application, they were not accompanied by supporting affidavits and they were not served on the parties to the application. Additionally, on March 10, 1993, Breadbasket Enterprises, Inc., licensee of KZXL(FM), Great Bend, Kansas, filed a petition to deny the application seeking consent to assign the licenses to Eagle. However, on July 16, 1993, Breadbasket filed a request to withdraw its petition. Both Breadbasket and the applicant have submitted affidavits which state that no money or other consideration in excess of legitimate and prudent expenses has been or will be paid by the applicant for the withdrawal of the petition. We note that matters raised in the petition are addressed by our decision herein. The request complies with the provisions of 47 C.F.R. § 73.3588, and thus will be granted herein and the petition dismissed.

Although the principal community contour of KHOK(FM) overlaps the principal community contour of KAYS(AM), it does not overlap the principal community contour of KHAZ(FM), and thus Eagle's present ownership of these stations is consistent with the local ownership rules. See 47 C.F.R. § 73.3555(a)(1)(iii). Additionally, the Hutchinson stations presently owned by Eagle, KWBW(AM) and KHUT(FM), do not share principal community contour overlap with Eagle's stations in Hoisington and Hays. However, the stations that Eagle proposes to acquire, KVGB(AM)/KVGB-FM in Great Bend, have principal community contours that overlap the principal community contours of stations that Eagle already owns, creating a chain of stations between Hays, Kansas and Hutchinson, Kansas. Not all of the same service stations in this chain have overlapping principal community contours. Specifically, the principal community contour of KVGB(AM) overlaps the principal community contours of KAYS(AM) and KWBW(AM), but the contours of these three stations do not all overlap each other. The principal community contour of KVGB-FM overlaps the principal community contours of KHAZ(FM) and KHUT(FM), but the contours of these three stations also do not all overlap each other. Additionally, the principal community contour of KHOK(FM) is almost entirely encompassed by the principal community contour of KVGB-FM.

3. The radio local ownership rules specifically recognize that there will not necessarily be overlap between same service stations in a group of commonly owned stations. Thus, the Commission has provided guidance for analyzing chains of proposed commonly owned stations. See 47 C.F.R. § 73.3555(a)(3)(ii) and (iii); Revision of Radio Rules and Policies (Memorandum Opinion and Order on Reconsideration), 7 FCC Rcd 6387, 6395-96 (1993)("First Reconsideration Order"), further recon. granted in part, denied in part, FCC 94-267, 9 FCC Rcd 7183 (1994)("Second Reconsideration Order"). In this regard, we note that although the rules address principal community contour overlap between same service stations, if there is mutual overlap between two same service stations, only one of which overlaps a third station, the rules require a separate evaluation of the overlap area created with the third station. See 47 C.F.R. § 73.3555(a)(1)(iii); 7 FCC Rcd 6396 n. 54. Applying the local ownership rules to the transaction proposed here, there are four combinations of mutually overlapping stations, which we will refer to as markets. The first market, which will be identified as the "Hays" market, includes KVGB(AM) and KAYS(AM) and KVGB(FM) and KHAZ(FM). The second market, the "Great Bend" market, includes KVGB-FM and KHOK-FM and KVGB(AM) and KAYS(AM). The third radio market, the "Hutchinson 1 " market, includes KVGB(AM) and KWBW(AM), and KHUT(FM). "Hutchinson 2," the fourth radio market, includes KVGB(AM), KVGB-FM, and KHUT(FM).

4. Eagle has submitted an exhibit that demonstrates that there are more than 15 commercial radio stations whose principal community contours overlap the principal community contours of the proposed co-owned stations in each of the markets at issue. Moreover, although approval of this transaction would result in

Eagle's ownership of four FM stations and three AM stations, Eagle's acquisition of KVGB(AM)/KVGB-FM complies with the local ownership rules' numerical ownership limits because the stations are arranged in a chain so that Eagle will not exceed the numerical cap of 2 AM and 2 FM stations in any market. However, because there are more than 15 stations in each market, Eagle must also demonstrate that its combined audience share would not exceed 25 percent in any particular market. See 47 C.F.R. § 73.3555(a)(1)(ii). Eagle's exhibit demonstrates that the combined audience share for the proposed co-owned stations in the Hays market and the Great Bend market, based on the most recent Arbitron data available at the time the application was filed, exceeds 25 percent. See 47 C.F.R. Sec. 73.3555(a)(1)(ii) and (a)(3)(iii); First Reconsideration Order, 7 FCC Rcd 6395-96 and n.54 (1992). Specifically, the evidence of record indicates that the combined audience share of the proposed co-owned stations is 38.68 percent in the Hays market and 38.38 percent in the Great Bend market. However, in both the Hutchinson markets, the combined audience share for the proposed co-owned stations is 9.52 percent.[3]

5. Nevertheless, Eagle asserts that grant of the proposed combination would serve the public interest. Eagle claims that the combined market share for the proposed co-owned stations in the Hays and Great Bend markets, based on Arbitron data, demonstrates only a presumptive level of undue concentration and that based on the totality of the circumstances presented, Eagle's common ownership of the stations at issue would not represent undue concentration. Moreover, Eagle contends that the long term financial distress of the stations to be acquired, the nature of the markets at issue, the insignificant amount of overlap between the stations, and the availability of alternative and competitive media sources demonstrate that the proposed transaction is permissible under the local ownership rules. In the alternative, Eagle argues that its acquisition of KVGB(AM) is permissible based on de minimis overlap and requests a temporary rule waiver in order to allow it to divest of KVGB-FM.

6. We will first address Eagle's argument that the proposed combination may be granted based on its showing of other relevant

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[3] The informal objections challenge the audience share data submitted. Some objections assert that the April 1993 Great Bend Media Survey shows a 43 percent listening audience for KVGB(AM)/KVGB-FM. Other objections argue that Eagle's ownership of the stations will result in a combined audience share of 70 percent. These statements are insufficient to raise a substantial and material question of fact which would require further inquiry. First, the Great Bend media survey referred to in one objection has not been submitted, and thus it is impossible to evaluate it as an alternative survey. The assertion that the proposed combination will result in a combined audience share of 70 percent is completely unsupported by any explanation or documentation which demonstrates how that share was determined. In any event, we decline herein to approve Eagle's proposal to acquire both KVGB(AM)/KVGB-FM on a permanent basis.

factors which purport to demonstrate that excessive concentration will not result. Specifically, Eagle argues that the "actual" market share of the stations to be commonly owned in the Great Bend and Hays markets is substantially lower. In this regard, Eagle states that KVGB(AM)/KVGB-FM are failed stations that have been involved in a bankruptcy proceeding for a substantial period of time. Eagle thus alleges that Arbitron data collected for the stations during the pendency of the bankruptcy, which demonstrate that audience share has increased, is necessarily suspect because the stations are under severe financial stress. Consequently, Eagle argues that audience share should be calculated by averaging the stations' combined audience shares over a two year period in order to correct anomolous share data reported for KVGB(AM)/KVGB-FM. Eagle also argues that there should be no presumption of excessive concentration based on the stations' combined audience shares because the markets are separate. In this regard, Eagle asserts that not all of the proposed co-owned stations contribute audience share to every county underlying, in whole or in part, the principal community contours of the stations that define each market. Additionally, Eagle asserts that the area covered by the principal community contours of the stations at issue here is well served by other broadcast and print media such that its proposed ownership of the stations in Hays, Hoisington, Great Bend and Hutchinson will not lead to excessive local concentration.

7. Under the radio local ownership rules, if audience share data are readily available from Arbitron or a similarly published ratings service, the applicant is required to provide that audience share data. See First Reconsideration Order, 7 FCC Rcd at 6399. However, the rules also provide for the submission of alternative showings in appropriate cases, e.g., to correct statistical anomalies in the generally available audience survey data, provide a better focused survey area or provide other data which proves that excessive concentration will not exist. Id; Note following 47 C.F.R. § 73.3555(a)(1)(ii). While we afford applicants the flexibility of providing an alternative showing, each applicant bears the burden of proving compliance with the 25 percent audience share limit. Id. at 6400. See also Patteson Brothers, Inc., 8 FCC Rcd 7595, 7596 (1993). Eagle's assertions concerning the separate nature of the markets at issue, including its analysis of whether each county in each market has measured audience share from all of the proposed co-owned stations appears to propose an alternative method for calculating audience share. However, the Commission has already determined the procedures for calculating audience share both in the absence of an Arbitron metro market and where the proposed transaction constitutes a chain. Thus, Eagle is essentially making an untimely request for reconsideration of the radio ownership proceeding. Moreover, arguments concerning the separate nature of the markets that are joined by the chain of stations here do not address the issue of concentration in the Hays and Great Bend markets, in both of which the combined audience share of the proposed co-owned stations exceeds 25 percent.

8. Furthermore, Eagle has not overcome the prima facie concern with excessive concentration in the Hays and Great Bend markets by its assertions concerning the inaccuracy of the Arbitron data compiled for KVGB(AM)/KVGB-FM during the pendency of the bankruptcy or by the submission of trend data. We have previously held that a presumption of excessive concentration cannot be overcome by trend data that demonstrates an average combined audience share of less than 25 percent unless it is first shown how that trend data overcomes a statistical anomaly in the current ratings provided by Arbitron. See, e.g., Patteson Brothers, Inc., 8 FCC Rcd at 7596 (1993); First Reconsideration Order, 7 FCC Rcd at 6399. Thus, "arguments relating to inaccuracies stemming from Arbitron's general survey techniques are unpersuasive in [the] absence of a showing that the purported flaws adversely affected the particular rating survey period in question more than other surveys conducted at other times or places under similar statistical conditions." See Patteson, supra. However, Eagle points to no defects in Arbitron's sampling procedure and does not offer any substantiation for its general assertion on the inaccuracy of Arbitron data collected for KVGB(AM)/KVGB-FM during the time that the stations were in bankruptcy. Moreover, even if the trend data demonstrated combined audience shares of 25 percent or less in the Hays and Great Bend markets, which it does not, Eagle has not demonstrated why the average trend data is more accurate. See First Reconsideration Order, 7 FCC Rcd at 6398 n.71, 6399. Accordingly, we have no basis on which to conclude that the combined audience share based on 1992 Arbitron data is anomalous. Additionally, Eagle cannot rely solely on the 1991 Birch county report to demonstrate that there is no excessive concentration in the Hays market based on a combined audience share of 15.63 percent, since those data were not the most recent audience share data available at the time that the application was filed. See Franklin Communications Partners, L.P., 8 FCC Rcd 4909 (1993). Moreover, the audience share calculation based on Birch data does not include all counties covered in whole or in part by the principal community contours of KVGB(AM), KVGB-FM, KAYS(AM) and KHAZ(FM), stations that define the Hays market.

9. Eagle's argument that the Hays/Great Bend/Hutchinson area is well served by other electronic and print media sources also is insufficient to overcome the prima facie concern with excess concentration demonstrated by the market share of the proposed combination in the Hays and Great Bend markets. In this regard, Eagle has enumerated the total number of radio and television, cable and print outlets which serve the entire area receiving principal community contour coverage from the stations it proposes to own. However, the First Reconsideration Order states that it is not adequate to recite data as to the number of local stations in operation as an alternative to demonstrate that there is no concern with excessive concentration. See 7 FCC Rcd at 6400. Eagle provides no further information concerning the nature of the mass media outlets available. Therefore, Eagle has not provided alternative data or factors sufficient to overcome prima facie concerns with excessive concentration in the two

markets where the combined audience share exceeds 25 percent. Accordingly, we will reject Eagle's alternative showing.

10. Because the combined audience share of the proposed co-owned stations exceeds 25 percent in two of the relevant markets, and Eagle's alternative showing is insufficient to overcome the prima facie concern with excessive concentration, Eagle's acquisition of KVGB(AM)/KVGB-FM is prohibited by the local ownership rules. Consequently, we will consider Eagle's request for waivers of the rules. In this regard, Eagle proposes to acquire KVGB(AM)/KVGB-FM, but to divest of KVGB-FM. To accommodate this proposal, Eagle argues that the degree of overlap between KVGB(AM), Great Bend and KAYS(AM) and KHAZ(FM), Hays, is de minimis.[4] Eagle asks the Commission to extend the concept of de minimis overlap, which was used in connection with the Commission's prior local ownership rules, to transactions proposed under the present, revised radio ownership rules. However, even if this overlap is considered de minimis, the combined audience share of the proposed co-owned stations would still exceed 25 percent in the Hays and Great Bend markets based on overlap between KVGB-FM and Eagle's other co-owned stations. Therefore, Eagle also pledges to divest itself of KVGB-FM. The radio local ownership rules are based on principal community contour overlap between stations in the same service, and those rules define the markets for the purpose of determing compliance with numerical and audience share limits based on the principal community contours of the proposed co-owned stations. Accordingly, Eagle's proposal to disregard the overlap between KVGB(AM) and KAYS(AM)and KHAZ(FM) as de minimis and to divest KVGB-FM affects how the transaction is analyzed to determine whether the proposal complies with the ownership rules.

11. Following the pledged divestiture of KVGB-FM, Eagle will remain the licensee of KAYS(AM) and KHAZ(FM) in the Hays market, stations it owned before entering into this transaction. However, assuming that the overlap between KVGB(AM) and KAYS(AM)/KHAZ(FM) is de minimis, the Hays market will be separate. Under these circumstances, the remaining proposed co-owned stations would define two markets. Eagle will be left with an AM/FM combination, KVGB(AM)and KHOK(FM), in the revised Great Bend market assuming that the overlap between KVGB(AM) and KAYS(AM)/KHAZ(FM) is de minimis and that KVGB-FM will be divested. We are required to consider the combined audience share of the proposed co-owned stations in the revised Great Bend market even though Eagle proposes to own only an AM/FM combination, because KVBG(AM)'s principal community contour overlaps the principal community contour of another co-owned AM station, KWBW(AM). See 47 C.F.R. § 73.3555(a)(3)(ii); First

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[4] The overlap between KVGB(AM) and KHAZ(FM) must be considered even though these stations are in different services because KVGB(AM) also overlaps a same service station, KWBW(AM). See First Reconsideration Order, 7 FCC Rcd at 6396, n.54; 47 C.F.R. § 73.3555(a)(1)(iii).

Reconsideration Order, 7 FCC Rcd at 6396 n.54. Excluding KVGB(FM), which is to be divested, the combined audience share of the proposed co-owned stations in the revised Great Bend market is 18.54 percent. The second market consists of KVGB(AM), KWBW(AM), and KHUT(FM). This is the same group of stations designated above as the Hutchinson 1 market, and we will continue to refer to this group of stations as the Hutchinson 1 market. Excluding KVGB-FM, which would be divested, the combined audience share of the proposed co-owned stations in the Hutchinson 1 market would be reduced from 9.52 percent to 5.03 percent. See Figure 2 [area designated "de minimis overlap" appears larger than the actual overlap area between those stations because the contours are not drawn to scale; figure for illustrative purposes to show relative positions of stations].

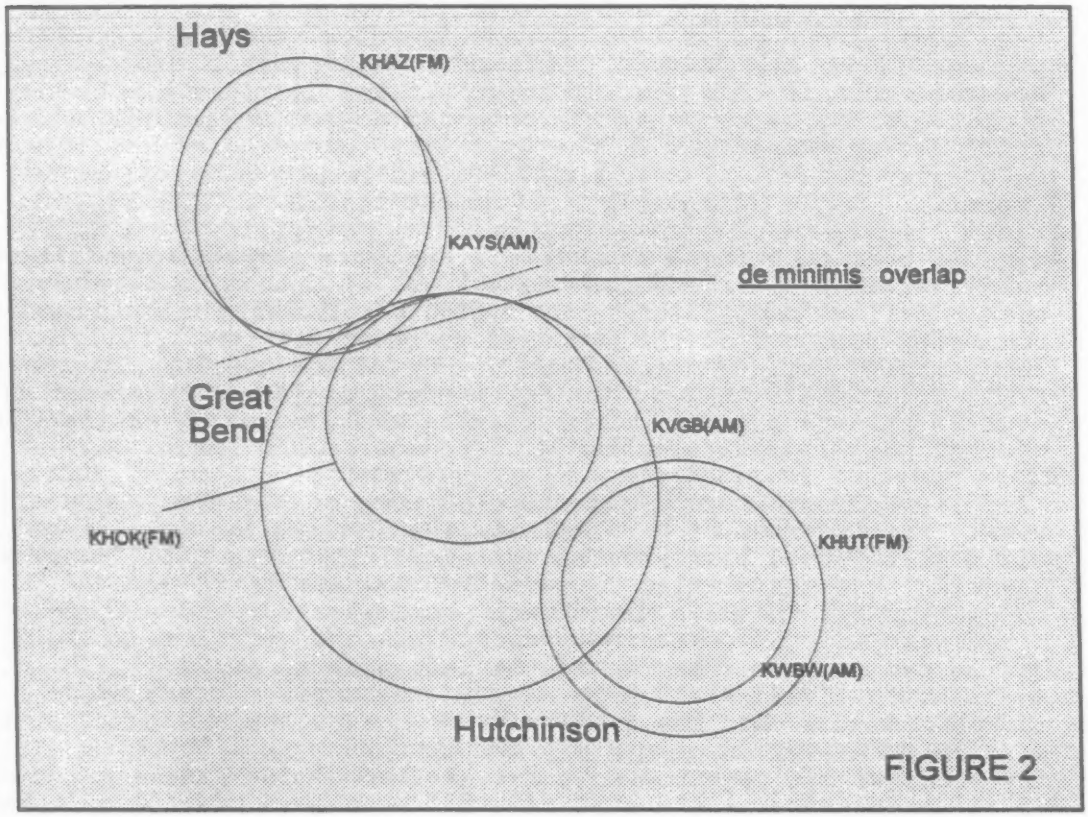

FIGURE 2

Thus, if both waivers requested by Eagle are approved, the transaction complies with our ownership rules.

12. In support of its argument that the overlap between KVGB(AM) and KAYS(AM) and KHAZ(FM) is de minimis, Eagle has submitted an engineering exhibit which characterizes the extent of overlap between the stations at issue in the Hays market. In this regard, Eagle first asserts that there is no actual overlap between KVGB(AM) and the Hays stations. According to Eagle, the

coverage of an AM station's principal community contour is determined by using an estimated ground conductivity contained in the rules. See 47 C.F.R. § 73.190. Eagle argues, however, that the estimated ground conductivity to be used to plot the principal community contour of KVGB(AM) overstates the station's signal strength. Eagle argues that this overstatement occurs because the estimate is based on the unusually high level of ground conductivity present in this area of Kansas. Moreover, Eagle also argues that the Commission's rules provide for the use of measured data where available to determine contour overlap because actual ground conductivity may vary from that estimated in the rules. See 47 C.F.R. § 73.190, 47 C.F.R. § 73.183(a). When actual measurements are made, Eagle contends, there is no overlap between KVGB(AM), KAYS(AM) and KHAZ(FM). In the alternative, Eagle contends that even if the estimated ground conductivity provided in the rules is used to determine signal coverage, the resulting overlap is nevertheless de minimis.

13. Engineering study of Eagle's showing reveals that even if direct measurement data is used in place of the ground conductivity estimates specified in Section 73.190, there is still some overlap between KVGB(AM) and KAYS(AM)/KHAZ(FM).[5] We therefore reject Eagle's assertion that use of actual measurement data in this case demonstrates that there is no overlap between the stations. However, we will consider Eagle's argument that this overlap is de minimis. The standard used under the former local ownership rules to determine whether the overlap between same service stations was de minimis required consideration of the totality of the circumstances presented, including the areas and populations within the overlap area expressed as a percentage of the total area and population within the relevant service contour of each station. Generally, if both the area and population within each station's overlap area constituted less than one percent of the total area and population covered by the relevant service contour of each of the stations at issue, the overlap was considered to be de minimis. See New Life Enterprises, Inc., 7 FCC Rcd 843, 844 (1992).

14. Engineering study confirms Eagle's assertion that the area of overlap between KVGB(AM) and KAYS(AM)/KHAZ(FM) constitutes less than one percent of the areas covered by the individual principal community contour of each of these stations. Specifically, the overlap area constitutes .005 percent of the area covered by principal community contour of KVGB(AM) and .0035 percent of the area covered by each of the principal community contours of KAYS(AM) and KHAZ(FM). Moreover, Eagle has submitted an exhibit that demonstrates that the overlap area affects less than one percent of the population receiving principal community contour service from each station. The overlap area includes .02

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[5] Commission policy permits the application of measured ground conductivities over an arc of plus or minus 10 degrees from the azimuth bearing of the measured radial. When Eagle's measurements are applied using this method, they fail to eliminate contour overlap.

percent of the population served by KVGB(AM)'s principal community contour and .04 percent of the population served by the principal community contours of both KAYS(AM) and KHAZ(FM). In this regard, although the informal objections generally challenge Eagle's coverage maps and assert that these maps must be inaccurate because KVGB(AM)/KVGB-FM can be heard in areas not indicated on the maps, the objections do not present any evidence as to specific inaccuracies in Eagle's showing regarding the extent of the overlap area and the Commission's staff engineers agree with Eagle's assessment of the size of the overlap area expressed as a percentage of the area covered by the principal community contours of KVGB(AM), KAYS(AM) and KHAZ(FM). Furthermore, the informal objections do not challenge the population figures submitted by Eagle or otherwise demonstrate that the populations in the overlap areas exceed 1 percent of the populations served by the principal community contours of the stations at issue.

15. We have not previously considered the issue of de minimis overlap in the context of the most recent revisions of the local ownership rules. See KVFW(AM), 6 FCC Rcd 4655, 4656 n.6 (1991); First Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). The objections do not articulate any reason why that standard should not apply in the particular circumstances of this case. We do believe we should apply our de minimis waiver standard strictly, given the significantly increased level of common ownership permitted by the revised rules. Accordingly, we will look at the areas and populations that constitute the overlap area, and will strictly adhere to the requirement that the areas and populations within the overlap area constitute less than one percent of the total areas and populations of the principal community contours of the stations at issue. Moreover, even where a strict de minimis showing is made, we will continue to consider any evidence, including audience share data, that suggests that the proposed co-owned stations serve substantial audiences in common.

16. The overlap between KVGB(AM) and KAYS(AM) and KHAZ(FM) meets the de minimis threshold, and assuming that Eagle will divest itself of KVGB-FM, the combined audience share of the stations Eagle proposes to own in the revised Great Bend market is less than 25 percent. Moreover, there is no evidence to suggest that KAYS(AM) and KHAZ(FM) serve substantial audiences in common with KVGB(AM) and KHOK(FM). The record demonstrates that KVGB(AM) and KHOK(FM) contribute no audience share in the county where the majority of the overlap area between KAYS(AM) and KHAZ(FM) lies, in the Hays market. Moreover, KAYS(AM) and KHAZ(FM) contribute an insignificant amount of audience share in the counties where the majority of the overlap area between KVGB(AM) and KHOK(FM) lies in the revised Great Bend market. KAYS(AM) and KHAZ(FM) have reported audience share in only two of these counties, and in each instance, receive a weighted combined audience share of less than one percent.

17. We reject Eagle's proposal for permanent common

ownership of all of the stations at issue in this chain based entirely upon a consideration of whether all of the counties underlying the principal community contours of the stations in the chain received audience share from all of the proposed co-owned stations. However, we believe that it is consistent with the goals of the revised local ownership rules, which allow for increased local ownership, to use such analysis as a secondary screening mechanism to ensure that overlap that otherwise meets the de minimis standard does not otherwise undermine diversity and competition in any market. Thus, we agree that the overlap between KVGB(AM) and KAYS(AM)/KHAZ(FM) is de minimis and based on our secondary analysis of audience share, find that extending the concept of de minimis overlap to the transaction at issue here will not compromise the goals of the revised local ownership rules. Consequently, in this case, we are persuaded that the public interest will be served by finding that the overlap between KVGB(AM) and Eagle's co-owned stations KAYS(AM) and KHAZ(FM) in the Hays market is de minimis.[6]

18. Grant of the assignment of the licenses for KVGB(AM)/KVGB-FM also requires favorable consideration of Eagle's temporary waiver request to permit it to divest of its interest in KVGB-FM in a "timely, efficient and orderly manner." As set forth above, the combined audience share of the proposed co-owned stations, based on Eagle's permanent acquisition of KVGB(AM) and timely divestiture of KVGB-FM, does not exceed 25 percent. In support of a temporary waiver, Eagle cites bankruptcy proceedings in which KVGB(AM)/KVGB-FM are the subject and pledges to recruit a qualified minority buyer for KVGB-FM. Furthermore, Eagle argues that Great Bend, Hays and Hutchinson are separate and independent economic entities such that its presently owned stations do not serve listeners or solicit advertisers outside the market that each station serves. In this regard, Eagle points to both the multiplicity of other mass media outlets in Hays, Great Bend and Hutchinson and to the separate nature of these areas. Eagle contends that approval of its acquisition of KVGB(AM)/KVGB-FM, with a period of time in which to divest of KVGB-FM, will not result in any decrease in competition or loss of program diversity, and thus that grant of the requested waivers will serve the public interest.

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[6] Although Eagle argues that the overlap between KVGB(AM) and KHUT(FM) and KWBW(AM) is de minimis, we disagree because the areas and populations at issue exceed 1 percent of the areas served by the principal community contours of each of the proposed co-owned stations. In this regard, Eagle's showing demonstrates that the overlap area constitutes 3.24 percent the area covered by the principal community contour of KVGB(AM) and includes .96 percent of the population served by KVGB(AM)'s principal community contour. Furthermore, the overlap area constitutes 6.4 percent of the area covered by the principal community contours of both KWBW(AM) and KHUT(FM) and includes .65 percent of the population served by the principal community contours of both KWBW(AM) and KHUT(FM).

19. Under the radio local ownership rules, the Commission maintains the flexibility to respond to situations in which application of the local ownership rules would be contrary to other public interest concerns. See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (1969) (subsequent history omitted), citing Rio Grande Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968)(per curiam). However, before a waiver of the local ownership rules may be granted, even on a temporary basis, the proponent of that waiver is required to sustain the burden of demonstrating that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule. See Patteson Brothers, 8 FCC Rcd 7595 (1993). See generally, Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986), recon. denied, Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd sub nom. Office of Communications of the United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990).

20. We have recently granted another applicant a limited twelve month waiver of the local ownership rules to allow for the divestiture of one of its co-owned stations. See Patteson Brothers, Inc., 8 FCC Rcd 7595 (1993). In that instance, we granted the waiver in order to allow for the divestiture of an FM station in a market of more than 15 stations where the combined audience share of the co-owned stations was 34.19 percent. The Commission found that, notwithstanding a combined audience share exceeding 30 percent, a limited waiver to allow for the divesture of one of the co-owned FM stations "will not unduly compromise the fundamental policies served by the local ownership rules." 8 FCC Rcd at 7598.

21. We believe that Eagle has similarly justified that a limited, one year waiver of the local ownership rules is appropriate. Eagle has demonstrated that the stations have been in bankruptcy for a considerable period of time, and that no separate buyer was available for either station standing alone. Under these circumstances, the stations are being operated by a court appointed liquidator. Nevertheless, the objections dispute Eagle's assertion of the severe financial distress being experienced by the stations. The objections claim that KVGB(AM)/KVGB-FM are not, in fact, financially compromised. Specifically, the objections state that since the time that the court appointed liquidator took control of station operations, the financial status of the stations has improved, and that continuous growth can be expected even if the stations are independently operated. Furthermore, the objections generally dispute Eagle's assertion that KVGB(AM)/KVGB-FM may be forced to go off the air if the buyer approved in the bankruptcy proceeding is not permitted to acquire the stations, notwithstanding the acquisition of KVGB-FM only on a temporary basis. The objections also protest Eagle's ultimate plan to divest of KVGB-FM, and argue that the stations should not be separated.

22. However, as Eagle points out, in other cases the Commission has waived the provisions of the multiple ownership

rules in order to preserve service on otherwise "failed stations." We agree that the financial status of the stations to be acquired is a factor that supports the temporary waiver requested here. See generally, Meridian Broadcasting Partnership, 8 FCC Rcd 8399 (1993). In this regard, the Commission has traditionally deferred to the bankruptcy court's determination concerning a debtor's financial status, because that forum has jurisdiction to decide these matters. See, e.g., Dennis Elam, Chapter Seven Trustee for Bakcor Communications, Inc. and Bakke Communications, Inc., 8 FCC Rcd 5185, 5186 (1993). The objections do not include evidence to support the assertion that the stations are now financially viable and do not substantiate the assertion that the stations will not be forced to discontinue operation if this transaction is not approved. Consequently, there is no basis to go behind the bankruptcy proceeding in order to consider the financial condition of the stations. Id. Moreover, we are cognizant of our obligation under the public interest mandate to consider the national policy underlying other federal laws, such as the bankruptcy laws relevant here. See LaRose v. FCC, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974). We believe that we can accommodate those bankruptcy policies here without harm to our radio multiple ownership rules by permitting Eagle to acquire both stations on a temporary basis.

23. Additionally, we note that Eagle pledges to actively recruit minority and female controlled companies to acquire KVGB-FM. The Commission promotes advancing diversity through increased minority ownership. See, e.g., Notice of Proposed Rulemaking in MM Docket No 94-149 and 91-140, 10 FCC Rcd , FCC 94-323(Dec. 15, 1994). Eagle has represented that efforts to locate such a buyer for KVGB-FM are underway. Under these circumstances, we find that grant of the temporary waiver request is also warranted based on Eagle's proposal to seek out a minority buyer, an undertaking that would not be possible if we required immediate divestiture of KVGB-FM. See,e.g., Viacom, Inc., 9 FCC Rcd 1577, 1579 (1994).

24. Furthermore, Eagle has demonstrated that there are a sufficient number of other mass media outlets serving Hays, Great Bend and Hutchinson. Specifically, Eagle lists 26 radio stations, 14 commercial and non-commercial television stations, 24 cable operators (excluding systems owned by Eagle), 9 daily and 33 non-daily newspapers that provide service to these areas. Although we rejected Eagle's assertions that the separate nature of the markets involved in this chain overcomes the local ownership rule's presumption of excessive concentration so as to permit permanent common ownership of the stations at issue here, the separate nature of the markets in the chain is a factor which nevertheless supports a temporary waiver. In particular, Eagle's showing demonstrates that Eagle's currently owned stations do not compete for advertising revenue and listeners, outside their respective principal community contour service areas. The objections contain assertions that another large corporation with

other stations in southwest and central Kansas has recently acquired a station in Great Bend, and thus that grant of the requested waiver will result in one of the markets relevant to this transaction being dominated by two large corporate entities. However, Commission records indicate that there are at least 7 separate licensees of the 17 radio stations counted in the revised Great Bend market. Consequently, these contentions do not raise a substantial and material question of fact that requires further inquiry. Based upon the totality of the circumstances presented, we find that Eagle has sustained its burden of demonstrating that the requested waivers are in the public interest. See Rio Grande Radio Fellowship, Inc. v. FCC, 406 F.2d at 666. Therefore, we believe that a limited one year waiver to allow Eagle to make arrangements to sell KVGB-FM will not unduly compromise the fundamental policies served by the local ownership rules. Accordingly, we will grant a one year waiver to allow Eagle to file an application for Commission consent to assign the license of KVGB-FM.

25. Other matters. The objections also propose that the stations be sold to an individual or small group of individuals instead of to Eagle. Additionally, the objection filed by Lyman James asserts that he stands ready to acquire the stations, and that his acquisition of the stations will assure continuity of service on KVBG(AM)/KVGB-FM without the necessity for a rule waiver. However, the Communications Act, as amended, provides that when the Commission acts on assignment or transfer applications, it may not consider whether the public interest might be better served by assignment of the licenses at issue to another party. 47 U.S.C. § 310(d). See RKO General (WOR-TV), 1 FCC Rcd 1081, 1082 (1987), aff'd on other grounds, 2 FCC Rcd 113 (1987).

26. The objections also raise concerns about future employment of the personnel of KVGB(AM)/KVGB-FM. The objections include contentions that if this application is approved, some of the current station employees will not be retained and will have little prospect of securing employment in the Great Bend area. General allegations contained in the objections concerning whether KVGB(AM)/KVGB-FM employees would be retained by Eagle are unsupported and speculative, and concern private contractual matters outside our regulatory authority. Thus these assertions do not constitute a basis for further inquiry. See Sonderling Broadcasting Co., 46 RR 2d 889, 894 (1979); John F. Runner, Receiver, 36 RR 2d 773, 776 (1976). See generally, Franklin Communications, Inc., 8 FCC Rcd at 4912. The objection filed by Georgia Dietz contains assertions that Eagle has acted improperly with regard to the operation of the stations during the pendency of this assignment application. However, Ms. Dietz's contentions are not sufficiently supported factually, and thus raise no substantial and material question of fact as to whether control of the station was prematurely transferred to Eagle. Other matters raised in Ms. Dietz's objection concerning job interviews conducted by Eagle for positions at its other stations relate to matters outside our regulatory authority, and

thus do not affect Eagle's qualifications. Accordingly, we find that the objections do not raise substantial and material questions of fact requiring further inquiry.

27. In view of the foregoing, IT IS ORDERED, That the request for a permanent waiver of 47 C.F.R. § 73.3555 to allow Eagle Communications, Inc. to acquire KVGB(AM) and the additional request for a temporary waiver of 47 C.F.R. § 73.3555 to allow Eagle a one year period in which to divest itself of KVGB-FM ARE HEREBY GRANTED. Because Eagle is otherwise qualified and the public interest would be served thereby, the application for consent to assign the licenses of KVGB(AM)/KVGB-FM, Great Bend, Kansas, from Sam Jones, Jr., Successor Liquidator for Forward of Kansas, Inc., Debtor-in-Possession, to Eagle Communications, Inc., File Nos. BAL-930126ED, BALH-930126EE IS GRANTED, subject to the condition that within one year from the adopted date of this decision that Eagle Communications, Inc. has filed an application for Commission consent to assign the license of KVGB-FM to a new party. IT IS FURTHER ORDERED That the letter pleading filed on October 4, 1993 by Delia and James P. West, Patricia and Charles Blackburn, Jeremy Shook and Kent Dietz, the letter pleading filed August 23, 1994 by Georgia Dietz, the letter pleading filed December 21, 1994 by Lyman James, and other letter pleadings filed in this matter treated as informal objections pursuant to 47 C.F.R. § 73.3587, ARE HEREBY DENIED and That, pursuant to 47 C.F.R. § 73.3588, the request for withdrawal of petition to deny this application filed by Breadbasket Enterprises, Inc on March 10, 1993 IS GRANTED and the petition IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In re Application of Sam Jones, Jr. Successor Liquidator for Forward of Kansas (Assignor) and Eagle Communications, Inc. (Assignee) for Assignment of Licenses of KVGB(AM)/KVGB-FM, Great Bend, Kansas (Memorandum Opinion and Order)

In this Memorandum and Order, the Commission grants the assignment of licenses for KVGB(AM)/KVGB-FM in Great Bend, Kansas to Eagle Communications, Inc. While approving the assignment, the Commission has granted a de minimis overlap waiver of its rules. As such, I concur in this decision.

In the past, I have expressed concern about the modification of the Commission's rules by way of our waiver process.[1] Today's decision serves only to underscore my misgivings. In 1993, the Commission revised its radio local ownership rules and established guidance for analyzing chains of proposed commonly owned stations.[2] However, despite these revisions which afford greater flexibility for local radio ownership, the Commission has again opted to utilize the de minimis waiver to accommodate the Great Bend transaction. In my opinion, it is imperative that the Commission recognize that waiver actions, which serve to further relax our local ownership regulations, become a means by which the Commission circumvents its rulemaking proceeding. Therefore, while I concur in today's decision, I remain concerned about the Commission's continued willingness to, in effect, modify its local ownership rules through the waiver process.

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[1]See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: ACT III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett- Concurring in Part); H & C Communications, Inc., 73 RR2d 1108 (1993) (Concurring Statement of Andrew C. Barrett); WOI-TV, 9 FCC Rcd 481 (1993) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of BREM Broadcasting and WKRG-TV, Inc., 9 FCC Rcd 1333 (1994) (Concurring Statement of Andrew C. Barrett); In re: Application of Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd 3621 (1994) (Concurring Statement of Commissioner Andrew C. Barrett).

[2]See 47 C.F.R. § 73.3555(a)(3)(ii) and (iii); Revision of Radio Rules and Policies, 7 FCC Rcd 6387, 6395-96 (1993), further recon. granted in part, denied in part, FCC 94-267, 9 FCC Rcd 7183 (1994).

FCC 95-50

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Applications of	)	
	)	
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	)	
	)	
For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, to construct, operate, and maintain facilities to provide video dialtone service to communities in Rhode Island and Massachusetts	)	File Nos. W-P-C-6982 W-P-C-6983

ORDER AND AUTHORIZATION

Adopted: February 7, 1995 Released: March 6, 1995

By the Commission:

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I. INTRODUCTION

1. New England Telephone and Telegraph Company (NYNEX) has filed two applications pursuant to Section 214 of the Communications Act of 1934, as amended (Communications Act or Act),[1] for authority to construct, operate, and maintain facilities to provide video dialtone service in various communities in Rhode Island and Massachusetts.[2] NYNEX's Section 214 applications to provide video dialtone services have been consolidated for the purposes of this Order because of their substantial similarity.

2. For the reasons discussed below, we grant NYNEX's applications, subject to the conditions described herein. We conclude that the applications as presented, with certain exceptions, satisfy our video dialtone rules and policies, and that the proposed construction would serve the public convenience and necessity.

3. In the Video Dialtone Order, the Commission determined that, through video dialtone, local telephone companies could participate in the video marketplace, consistent with the statutory

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1 47 U.S.C. § 214.

2 On January 1, 1994, the New England Telephone and Telegraph Company began doing business as NYNEX. NYNEX filed its applications with the Commission on July 8, 1994, and supplemented the applications on July 29, 1994.

telephone company-cable television cross-ownership restrictions.[3] We defined "video dialtone" as the provision by a local telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis.[4] A "basic platform" is a common carriage transmission service coupled with the means by which end-user subscribers can obtain access to all video programming carried on the platform.[5] If a local telephone company offers such a basic platform, it may also provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services associated with the platform.[6] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[7]

II. THE APPLICATIONS

4. On July 8, 1994, NYNEX filed two Section 214 applications for authority to provide video dialtone service in certain areas of Massachusetts and Rhode Island. NYNEX supplemented each of these applications on July 29, 1994. The application to provide video

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3 The Commission adopted video dialtone rules in Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Video Dialtone Order), aff'd in part and modified in part, 10 FCC Rcd 244 (1994) (Video Dialtone Reconsideration Order), appeal pending sub nom., Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

4 Video Dialtone Order at para. 2.

5 Id. at n.3. Because of the common carrier nature of the service, telephone companies would not be permitted to limit or block customer-programmers' or end-users' access to the basic platform.

6 Video Dialtone Order at para. 2. The telephone company may offer enhanced and other nonregulated services related to video programming to any video programmer, in areas substantially served by a video dialtone platform, without regard to whether the video programmer purchasing such services has any nexus to that platform. Video Dialtone Reconsideration Order at para. 88.

7 Video Dialtone Order at paras. 21, 72, 141-142. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. 47 U.S.C. § 214(a).

dialtone service in Massachusetts proposes a system that will pass approximately 334,000 homes and businesses. The application to provide service in Rhode Island proposes a system that will pass about 63,000 homes and businesses. On September 9, 1994, two parties filed consolidated petitions to deny with respect to the applications and one party filed a petition to deny with respect to the Rhode Island application alone. On September 22, 1994, NYNEX filed its Consolidated Opposition to Petitions to Deny. On October 4, 1994, three parties filed replies to NYNEX's Consolidated Opposition.[8]

5. NYNEX proposes to deploy hybrid fiber optic and coaxial (HFC) broadband networks that will provide advanced voice, data, and video services, including interactive video entertainment, multimedia education, and health care services.[9] NYNEX plans to deploy this type of network to the majority of its customers by the year 2010.[10]

6. NYNEX's proposed video dialtone systems make available three types of service arrangements: analog broadcast, digital broadcast, and digital interactive service.[11] Video programmers may deliver an "analog, digital, or other agreed upon signal" that NYNEX plans to modulate and/or encode as necessary.[12] The allocation plan provides for the offering of 21 analog channels, all but one of which will be for over-the-air broadcast programming services, and, depending on compression rates, between 400 and 800 digital channels.[13] The remaining analog channel is to be used as a "NYNEX Level 1 Gateway Directory."[14] This NYNEX Directory will provide subscribers with information on video programmers available on the video dialtone system and will provide navigational aids to allow subscribers to connect to those programmers. Those end users subscribing to more than just the 20 analog broadcast channels will require a digital set-top box.

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8 A list of filings in these proceedings is contained in the Appendix.

9 Massachusetts and Rhode Island Applications at 2.

10 Id.

11 Id. at 6.

12 Id., Exhibit A at 4 & Exhibit G (Illustrative Tariff) at y-9.

13 Rhode Island Application at 4. NYNEX anticipates working with video programmers to determine desirable compression rates for different types of programming.

14 Id.

7. With respect to the 20 channels dedicated to analog broadcast programming, NYNEX proposes to seek one Administrator to deliver those channels.[15] In its applications, NYNEX outlines the basic criteria for selection of an Administrator.[16] In the event that no video programmer is willing to act as Administrator, NYNEX, providing it has the regulatory and legal authority to do so, proposes to act as Administrator.[17]

8. NYNEX asserts that by limiting the number of analog channels available, it will substantially increase the digital capacity of the systems, allowing it to provide video dialtone service to a greater number of programmers.[18] With respect to the allocation of digital broadcast capacity, NYNEX states that no video programmer may acquire more than 30 percent of the available radio frequency (RF) spectrum designated for digital broadcast channels.[19]

9. The NYNEX video dialtone service is to be provided over a network of "Video Hubs," "Video Mini Hubs," fiber optic transport and coaxial cable distribution facilities, and associated electronic equipment, configured to deliver video signals from video programmers to subscribers.[20] Each Video Hub will serve one or more Video Mini Hubs. Video programmers may deliver their program signals to a Video Hub or directly to the Video Mini Hub. The Video Mini Hubs will serve as the points of distribution of video signals to subscribers.

10. NYNEX is also considering offering certain nonregulated services in connection with the video dialtone platform, including an enhanced storage option, a Level 2 Gateway, converter set-top

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15 Id. at 7.

16 Id., Exhibit G (Illustrative Tariff) at y-3. These criteria include, among other things: (1) that the Administrator certifies that it is authorized to provide and maintain the program content proposed for each serving area for the duration of the contract; (2) that the Administrator must make programming available for resale in a nondiscriminatory manner to other customer-programmers; and (3) that the Administrator pay tariffed rates for the analog channels used to carry over-the-air programming and for any other channels leased. Id.

17 Id. at 7 n.11.

18 Id. at 6.

19 Id. at 7-8.

20 Id. at 4.

equipment, home wiring, and billing and collection service.[21]

11. NYNEX states that it will account for the costs and revenues associated with the provision of video dialtone service in accordance with Parts 32, 36, and 64 of the Commission's rules.[22] According to NYNEX, all regulated cable and wire facilities and circuit equipment costs needed to provide video dialtone service will be identified as either "Video Dialtone Only" or "Common Use."[23] "Video Dialtone Only" equipment will be directly assigned to the interstate jurisdiction for separations purposes. NYNEX states that it will allocate "Common Use" equipment on the basis of the relative number of service connections provided to end user subscribers that use this equipment.

III. DISCUSSION

12. To qualify as video dialtone under our rules, a service must meet the requirements set forth in our Video Dialtone Order and modified and clarified in the Video Dialtone Reconsideration Order. Among other things, the service must include a basic common carrier platform available to multiple video programmers on a nondiscriminatory basis, and a means by which end-user subscribers can access any and all of the video programming offered.[24] The platform must provide "sufficient capacity to serve multiple video programmers."[25] Carriers must also expand the capacity of the platform to the extent "technically feasible and economically reasonable."[26] After extensive evaluation, we conclude that the system proposed by NYNEX does satisfy the "basic platform" requirement of our video dialtone rules. For the reasons set forth below, we conclude that NYNEX's applications meet the requirements of nondiscrimination and adequate capacity.

A. Video Dialtone Issues

13. In the following section, we focus on two basic video dialtone requirements. First, a local exchange telephone company (LEC) that wishes to offer video dialtone service must make

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21 Id. at 5.

22 Id. at 13.

23 Id. at 14.

24 Video Dialtone Order at para. 2 & n.3; see Video Dialtone Reconsideration Order at paras. 30-34.

25 Video Dialtone Order at para. 29.

26 Video Dialtone Reconsideration Order at para. 38.

available a basic common carrier platform that contains sufficient capacity to serve multiple video programmers and service providers.[27] Second, the LEC must make this capacity available on a nondiscriminatory basis.

1. Pleadings

14. Sufficient Capacity. Cox and NECTA contend that the 20 channels allocated for analog video dialtone service are insufficient to serve multiple video programmers.[28] Furthermore, NCTA contends that, contrary to video dialtone requirements, NYNEX has no plan for addressing an analog capacity shortfall should demand for channels exceed supply.[29]

15. Non-Discriminatory Access. Petitioners claim that, not only does NYNEX's proposed channel allocation fail to provide sufficient capacity to serve multiple video programmers, but it will also result in unreasonable discrimination in violation of video dialtone rules and general common carrier policy. Petitioners argue that NYNEX's applications should be rejected because its proposed analog channel allocation plan and proposed conditions on programmer access to the platform do not meet the Commission's basic requirements for video dialtone.[30] Petitioners maintain that one of the cornerstones of video dialtone service, as a common carrier offering, is the requirement that platform capacity be made available to all qualified customer-programmers on a non-discriminatory basis.[31] Petitioners state that NYNEX's proposal, by contrast, would allocate all of the analog channel capacity for one purpose, carriage of over-the-air broadcasters, which would constitute discrimination.[32] NCTA, NECTA, and Discovery argue that broadcasters will have preferential access to the platform because they will be the only video programmers carried on

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27 Video Dialtone Order at para. 29.

28 Cox Petition at 14; see NECTA Reply at 27, 28-29.

29 NCTA Petition at 5; NCTA Reply at 7; see NECTA Reply at 27, 29 ("NYNEX evidently has no intention of trying to meet the demand for analog channels.").

30 NECTA Petition at 19; NCTA Petition at 5; Cox Petition at 14-16.

31 See NCTA Petition at 6; NECTA Petition at 19.

32 See, e.g., NCTA Petition at 5.

the analog portion of the platform's capacity.[33] They claim that this arrangement is discriminatory because all other non-broadcast programmers will be required to use the platform's digital capacity, which requires end user subscribers to use a set-top converter device.[34] Discovery notes that channel allocation issues are before the Commission in CC Docket 87-266, and argues that the Commission should rule on these matters before granting the NYNEX applications.[35]

16. Furthermore, petitioners challenge NYNEX's proposal to select an "administrator," who would be responsible for the programming on the platform's analog channels and would be required to resell that programming to all other programmers on the system. The petitioners assert that allocating all of the analog capacity to an administrator-programmer violates video dialtone rules and policies that require non-discriminatory access to the platform for all customer-programmers. Several petitioners also contend that NYNEX has failed adequately to describe the process by which the administrator-programmer will be selected.[36] NECTA argues that this arrangement will create a preferential position for the administrator vis-a-vis all other video programmers on NYNEX's platform.[37] NECTA also faults NYNEX's plan to offer volume discounts based on the number of subscribers each video programmer obtains, arguing that it will disproportionately favor the Administrator.[38]

17. Provision of Video Programming. Moreover, petitioners contend that NYNEX's plan to allocate all of the platform's analog capacity for over-the-air broadcasters violates the Commission rule precluding LECs from determining how video programming is presented for sale to consumers. NCTA, for example, argues that "[b]y

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33 NCTA Petition at 6; NECTA Petition at 19; Letter from William B. Baker, Attorney for Discovery Communications, Inc. to William F. Caton, Acting Secretary, FCC (Decmber 23, 1994) (Discovery Letter). Petitioners argue that in addition to establishing a preferred class of video programmers, NYNEX also proposes preferential channel assignments for the analog channels, which is discriminatory. NECTA Petition at 23; NCTA Petition at 6.

34 NCTA Reply at 6.

35 Discovery Letter at 2.

36 Cox Petition at 15; NECTA Reply at 30; NCTA Petition at 9.

37 NECTA Petition at 19; see NCTA Reply at 6.

38 NECTA Petition at 21; see infra para. 34.

establishing a basic -- analog broadcast only -- tier, it [NYNEX] is selecting programming by bundling and tiering."[39] Cox argues that by limiting the number of analog channels available, and by restricting the use of those channels to broadcasters, NYNEX has selected and bundled a tier of programming.[40] Petitioners also claim that NYNEX's role in the selection of the administrator will improperly involve it in determining how video programming is presented for sale to consumers.[41] For example, NCTA states that "by selecting the Administrator . . . NYNEX would be in a position to (at least indirectly) select programming for sale to consumers; [and] make bundling, tiering, pricing and related decisions . . . ."[42]

18. Miscellaneous Issues. NECTA asks the Commission to reject NYNEX's proposed "Level 1 Gateway Directory" that would purportedly enable subscribers to access the programmer of their choice.[43] NECTA argues that this "gateway" will improperly interject NYNEX between customer-programmers and subscribers. NECTA also claims that NYNEX's required one-year minimum service commitment for customer-programmers is unreasonably discriminatory.[44] According to NECTA, such a provision unduly favors large programmers over smaller ones. In addition, NECTA asks the Commission to clarify that NYNEX is not permitted to limit the offering of compatible video dialtone customer premises equipment (CPE) or maintenance of such equipment by tariff or otherwise.[45] The Independent Data Communications Manufacturers Association (IDCMA) asserts that the network interface devices described in NYNEX's applications may perform some type of multiplexing function, and if so, should be classified as CPE and offered on an unregulated basis.[46] Finally, NECTA argues that NYNEX's proposal to assess an access charge on end user subscribers

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39 NCTA Reply at 8; see Cox Petition at 15.

40 Cox Reply at 4.

41 NCTA Petition at 10; Cox Petition at 15; NECTA Petition at 22.

42 NCTA Petition at 10.

43 NECTA Petition at 23.

44 Id. at 26.

45 Id. at 25.

46 Ex Parte Letter from Jeffrey A. Campbell, IDCMA, to William F. Caton, Acting Secretary, FCC (Nov. 18, 1994).

should be rejected as baseless.[47] NECTA asserts that charges for video dialtone service should be levied on customer-programmers, not subscribers.

19. NYNEX Opposition to Petitions to Deny. NYNEX responds that, as part of its video dialtone service arrangement, it proposes to allocate 20 analog channels that will be made available under tariff to an administrator.[48] NYNEX states that it will offer the analog channels on a common carrier (i.e. a first-come, first-served) basis, to a third party agreeing to the tariffed price, terms and conditions governing the administrator.[49] Under those tariff provisions, the administrator will select and deliver programming dedicated to over-the-air broadcasts and public access channels.[50] Further, NYNEX argues that, under the Commission's video dialtone rules, it is not required to provide any analog channels. NYNEX claims it can provide between 400 and 800 digital channels; capacity sufficient to serve multiple video programmers based upon initially foreseeable market demand.[51] In addition, NYNEX claims that its administrator proposal is consistent with the Commission's cross-ownership restrictions and with the Video Dialtone Order. NYNEX claims in selecting the administrator it will not decide on any video programming, arguing that only the administrator would make those decisions. NYNEX maintains that it will make no editorial decisions regarding the programming carried on its video dialtone platform, and that it will not be involved in the transmission of programming directly to end user subscribers.[52] NYNEX also denies NECTA's assertion that the administrator would be accorded preferential treatment.[53]

20. In response to challenges regarding its proposed Level 1 Gateway Directory, NYNEX claims that petitioners base their arguments on a misreading of the Video Dialtone Order. NYNEX contends that, contrary to petitioners' contentions, its proposed

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47 Id. at 28-29.

48 NYNEX Opposition at 4.

49 If a third party administrator cannot be found, NYNEX proposes to serve as administrator. The questions raised by this proposal are discussed in a separate section. See infra paras. 26-27.

50 Id. at 6.

51 Id. at 10.

52 Id. at 13.

53 Id. at 12-13, 14-18.

Gateway Directory is not a level two enhanced gateway, but is a basic directory and routing feature of the platform, and is permissible under the video dialtone rules.[54] With respect to petitioners' other arguments, NYNEX asserts that they are more appropriately addressed in the tariff review stage.[55] According to NYNEX, the end user access charge, one-year minimum service requirement, and volume discounts are proposed tariff provisions, and, based on the Commission's statements in the Dover Order,[56] are properly considered in the subsequent tariff review process. Nevertheless, NYNEX contends that the proposed provisions are reasonable and lawful.[57]

2. Discussion

21. Sufficient Capacity. A local telephone company that wishes to provide a video dialtone service must make available a basic common carrier platform to multiple video programmers, and must be able to expand its capacity to accommodate increasing demand so as not to become a bottleneck.[58] The capacity must be expanded to the extent it is technically feasible and economically reasonable.[59] In the Dover Order, we stated that, in applying the capacity requirement, we would review each application on a case-by-case basis taking into consideration: (1) the initial capacity available; (2) the applicant's ability to expand this capacity; and (3) the demand for capacity.[60] Under our Video Dialtone Orders, the

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54 Id. at 22; Ex Parte Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, FCC, at 2 n.3 (Dec. 22, 1994). The Commission distinguishes between: (a) a "first-level [video dialtone] platform [that] consists of basic, regulated video delivery services, which must be provided on a non-discriminatory, common carrier basis[;]" and (3) "[t]he second-level of services [which] consists of enrichments to the basic service, including enhanced and other nonregulated services." Video Dialtone Reconsideration Order at para. 224.

55 See, e.g., NYNEX Opposition at 19.

56 New Jersey Bell Tel. Co., 9 FCC Rcd 3677 (1994) (Dover Order).

57 See NYNEX Opposition at 19-21.

58 Video Dialtone Order at paras. 2, 29, 30.

59 Video Dialtone Reconsideration Order at para. 38.

60 Dover Order, 9 FCC Rcd at 3685, para. 41; see also Southern New England Telephone Co., 9 FCC Rcd 1019 at para. 13 n.46 (SNET Trial). In SNET Trial, we also considered a fourth

question of adequate capacity is treated as a separate issue from the provision of nondiscriminatory access to the available capacity, which is addressed in the next section.[61]

22. NYNEX proposes to construct a state-of-the-art broadband hybrid fiber-coaxial network that will initially offer 21 analog video channels and between 400 and 800 digital video channels. The digital capacity will provide a foundation for a wide array of interactive services that will allow subscribers to select unique video services with enhanced functionalities. Digital networks also are more compatible with stored digital technologies and advanced service features and capabilities. In addition, digital networks can be maintained more efficiently.[62] We find that it is reasonable for NYNEX to choose to deploy this video dialtone architecture, which will serve multiple video programmers under the present circumstances. Given these advantages of digital networks, and in light of our conclusion, below, that NYNEX's proposed architecture will offer sufficient capacity to accomodate multiple video programmers, we find that NYNEX's application meets our capacity requirements.

23. Cox, NECTA, and NCTA argue that NYNEX's decision not to offer additional analog capacity violates our sufficient capacity requirements. This argument appears to be premised on the assumption that large numbers of subscribers will lack the set-top boxes necessary to receive digital channels, and that programmers, therefore, will need analog channels to reach a broad subscriber base. While this assumption may be valid in the context of some video dialtone architectures, it would not appear to apply to NYNEX's proposed system. In particular, because NYNEX will offer only 21 analog channels (one of which will be used as a menu), subscribers to NYNEX's system will need a set-top box in order to receive more than a very basic video offering. For this reason, NYNEX projects that 75 to 85 percent of television sets using NYNEX's video dialtone service will have a set-top box. Given the limited amount of programming available on the analog channels, this projection does not appear unreasonable. In addition, we note that NYNEX will be offering programmers analog to digital conversion services.[63] These factors greatly increase the utility of digital capacity in the short-term. No party has offered any

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factor, applicable to trials, which is the duration of the offering.

61 See infra paras. 25-28.

62 Massachusetts Application at 7; Rhode Island Application at 7.

63 See, e.g., Rhode Island Application, Exhibit A at 3, 4, Exhibit G at y-9.

evidence or arguments to show why digital capacity will nevertheless not be viable. We therefore conclude, based on the current record, that programmers should be able to make effective use of NYNEX's digital capacity, even in the short-term, and will not require analog channels to reach a broad subscriber base. Thus, NYNEX does not need to offer additional analog channels in order to comply with our capacity requirement. Because the availability of digital capacity is a necessary premise for our conclusion that these applications satisfy our video dialtone requirements, however, we are granting this authorization subject to the condition that NYNEX make digital channels available to customer-programmers, and that set-top boxes be available for use by subscribers, when NYNEX begins to offer video dialtone service over these systems. Based on the present record, we believe that it would not serve the public interest for NYNEX to begin to provide service over this system if it could offer customer-programmers only the 21 analog channels.

24. NYNEX states that it will take reasonable steps to accommodate additional demand by increasing digital broadcast capacity.[64] We note that no party has argued that NYNEX's plans to provide digital capacity are inadequate. In order to ensure the continued availability of sufficient capacity, however, we condition this approval on NYNEX's compliance with our requirement that it provide notice to the Commission of any anticipated or actual digital capacity shortfall. In particular, in keeping with the Video Dialtone Reconsideration Order, we require NYNEX to notify the Chief of the Common Carrier Bureau of any anticipated or existing digital capacity shortfall, and of plans for addressing any such shortfall.[65] Such notice must be provided within thirty days after NYNEX becomes aware of an anticipated digital capacity shortfall or within five days of denying any video programmer access to the platform, due to digital capacity limitations, in whole or in part, whichever occurs first. To the extent NYNEX concludes that expansion of digital capacity is not technically feasible or economically reasonable, at that time, it must explain in detail the basis for its determination and indicate when it anticipates expansion would be technically feasible or economically reasonable. Given that our determination that NYNEX will be offering a platform with sufficient capacity relies, in part, on information concerning the anticipated marketplace acceptance of digital set-top boxes, we also require NYNEX to report on the percentage of video dialtone end user subscribers or households

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64 Id. at 8; see Ex Parte Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, FCC, Att. at 3 (Dec. 22, 1994).

65 See generally Video Dialtone Reconsideration Order at para. 38.

obtaining digital set-top converters for use with services provided over the NYNEX video dialtone platform. The first such report shall be filed six months after the video dialtone system becomes operational, i.e., the date on which service is available to at least one end user subscriber. Reports are to be filed every six months thereafter for the next three years. It is our intention to accomplish this without placing burdens on NYNEX's customer-programmers or CPE providers.

25. Non-Discriminatory Access. In addition to requiring LECs to provide a sufficient amount of capacity, we require LECs to make this capacity available on nondiscriminatory terms to multiple video programmers. In implementing this requirement in individual applications, we scrutinize each LEC's proposed allocation of analog and digital capacity to ensure that it is consistent with our rules and policies.

26. A number of participants in this proceeding challenge NYNEX's proposed allocation of analog channels to over-the-air broadcasters as discriminatory. Parties also raise certain questions concerning NYNEX's proposal for an administrator for the analog channels. Given the pendency of a rulemaking proceeding addressing these issues, however, we decide not to address the merits of NYNEX's specific proposal in the context of this application. NYNEX's channel allocation plan is similar to Bell Atlantic's "will carry" proposal in that it would offer preferential access to analog channel capacity to local broadcast stations and public access programmers.[66] We are currently considering the issues raised by preferential access plans in our Third Further Notice of Proposed Rulemaking.[67] The Third Further Notice also raises issues related to the sharing of analog channels on video dialtone systems, including the use of channel managers and administrators.[68]

27. During the pendency of that rulemaking, NYNEX may proceed with its video dialtone construction, but may not implement its proposal to allocate analog channels solely to over-the-air broadcasters and public access programmers, or establish an administrator for these channels. Given the expedited schedule for the rulemaking, we do not anticipate that NYNEX will complete

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66 See Bell Atlantic Section 214 Video Dialtone Applications, File Nos. W-P-C-6966 (June 16, 1994) and W-P-C-6914 (June 16, 1994).

67 Video Dialtone Reconsideration Order at para. 284.

68 Video Dialtone Reconsideration Order at paras. 273-275.

construction before the rulemaking is concluded.[69] If we determine in the rulemaking that "will carry" or similar plans, or the use of a channel administrator like that proposed by NYNEX is unlawful or inconsistent with our video dialtone rules and policies, NYNEX will have to amend its application to propose an alternative analog channel allocation mechanism and/or a different means of administering these channels. Thus, our grant of this authorization does not in any way signal a retreat from our prior finding that "anchor programmer" proposals are inconsistent with our video dialtone requirements.[70] Any such mechanism must ensure that analog capacity offered by NYNEX will be available on non-discriminatory terms and conditions to multiple video programmers.

28. We find that NYNEX's plan for allocating digital capacity is consistent with our non-discriminatory access requirements. NYNEX will offer digital capacity to video information providers on a first-come, first-served basis.[71] NYNEX explains that allocation of digital channels can be flexible to accommodate demand for interactive applications.[72] The programming carried on the digital broadcast channels will be identical throughout the entire video dialtone serving area.[73] In contrast, the platform's digital interactive equipment will have the ability to provide different bundles of interactive channels to different areas, depending upon demand.[74] In addition, the Asynchronous Transfer Mode (ATM) technology employed for digital interactive applications is modular, and ports can be added to meet additional interactive demand.[75] NYNEX states that it will take these measures to meet any

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69 In the event NYNEX expects to complete construction before action in the rulemaking, it may seek approval of an alternative analog channel allocation plan for the interim period.

70 Video Dialtone Reconsideration Order at paras. 27-28 & 35.

71 Massachusetts Application at 7; Rhode Island Application at 7.

72 Ex Parte Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Matters, NYNEX to William F. Caton, Acting Secretary, FCC, Att. at 3 (Dec. 22, 1994) (hereinafter "NYNEX December 22, 1994 Ex Parte Letter").

73 NYNEX has also proposed to limit acquisition of the platform's digital broadcast capacity by any single video programmer to 30 percent. Massachusetts Application at 7-8; Rhode Island Application at 7-8.

74 NYNEX December 22, 1994 Ex Parte Letter, Attachment at 3.

75 Id.

additional demand.[76] We also adopt, as a condition of this authorization, NYNEX's representation that no video programmer may acquire more than 30 percent of the available capacity designated for digital broadcast channels.

29. Provision of Video Programming. We now address allegations that various elements of NYNEX's plan would impermissibly involve it in the provision of video programming. These contentions raise two primary issues: (1) whether NYNEX's selection of the analog channel administrator constitutes the provision of video programming; and (2) whether NYNEX's reserving use of the 20 analog channels for over-the-air broadcasters and public access programming constitutes provision of video programming.

30. We reject petitioners' contention that NYNEX would be providing video programming to subscribers if allowed to select the analog channel administrator.[77] Determining how video programming is presented for sale to subscribers includes making decisions about the bundling or tiering of programming or the price, terms, or conditions on which the programming is offered to subscribers.[78] We find that NYNEX's role in selecting an analog channel administrator, based on objective criteria, would not involve NYNEX is making such decisions regarding the presentation of programming. Rather, such decisions would be made by the administrator, who would put together programming services for the analog channels, and make those channels available to video programmers. Under NYNEX's proposal, the administrator, not NYNEX or an affiliate, will be responsible for obtaining the programming rights, and determining the resale price structure and price levels.

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76 Id.

77 In a number of cases, the courts have found the statutory telephone company-cable television cross-ownership restriction unconstitutional. Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993), aff'd, No. 93-2340 (4th Cir. Nov. 21, 1994); U S WEST, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994), aff'd, No. 94-35775 (9th Cir. Jan. 3, 1995); BellSouth Corp. v. United States, No. CV 93-B-2661-S (N.D. Ala. Sept. 23, 1994); Ameritech Corp. v. United States, No. 93 C 6642 (N.D. Ill. Oct. 27, 1994); NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994); GTE South , Inc. v. United States, No. 94-1588-A (E.D. Va. Jan. 13, 1995); United States Tel. Ass'n v. United States, No. 1:94CV01961 (D.D.C. Feb. 14, 1995).

78 Video Dialtone Order at para. 69; Video Dialtone Reconsideration Order at para. 64.

31. At this time, we need not address petitioners' contention that NYNEX's allocation of analog channels for over-the-air broadcasters and public access programming involves it in the provision of video programming.[79] As discussed above, in responding to separate allegations that this element of the NYNEX proposal is discriminatory, we are temporarily barring NYNEX from implementing its channel allocation proposal because channel allocation issues are currently the subject of a Commission rulemaking. In light of this, we decline to address, at this time, the question of whether NYNEX's analog channel allocation plan would impermissibly involve it in the provision of video programming.

32. While the U.S. District Court in Maine has granted NYNEX relief from the telephone company-cable television cross-ownership restriction,[80] the instant applications do not specifically propose that NYNEX or an affiliate provide video programming directly to subscribers in its service areas. We consider these applications under our existing video dialtone rules, and do not address any of the regulatory issues raised by the possible provision by NYNEX of video programming to end users over its video dialtone platforms. We are addressing the need for additional safeguards in the event of LEC provision of video programming over their platforms in a rulemaking proceeding.[81] If NYNEX wishes to provide video programming directly to end users pending completion of the rulemaking, it must request additional Section 214 authority so that we can determine whether, and under what conditions, we should permit NYNEX to do so. Upon completion of the rulemaking, NYNEX must comply with the requirements then applicable to telephone company provision of video programming. If NYNEX wishes to assume the role of the analog channel administrator prior to completion of the programming safeguards rulemaking, it must request appropriate Section 214 authority so that we can evaluate its proposal, and determine whether any additional safeguards are needed. Thereafter, the requirements established in the rulemaking proceeding will apply.

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79 The question of whether allocating analog channels for over-the-air broadcasting and public access programming constitutes the provision of video programming by NYNEX is different from the question of whether this is unreasonably discriminatory. See supra paras. 25-28 for a discussion of the discrimination issue.

80 NYNEX Corp. v. United States, No. 93-323-P-C (D. Me. Dec. 8, 1994).

81 Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking, FCC 95-20 (released Jan. 20, 1995).

33. Miscellaneous Issues. We reject NECTA's request that we deny NYNEX's proposed "Level 1 Gateway Directory." NECTA argues that the gateway directory would improperly interject NYNEX between customer-programmers and end user subscribers. In the Video Dialtone Order, the Commission noted that LECs could create directories or menu screens that would provide subscribers with information about the various programming and services available on the video dialtone platform.[82] In a recent ex parte filing, NYNEX provided the Commission with additional information about its proposed gateway directory. Significantly, NYNEX asserted that all video programmers would have the option of having a listing included on the directory.[83] It explained that, for end user subscribers receiving only analog channels, the directory would provide information about the various programmers on the platform and how to contact them.[84] For subscribers with a digital set-top device, the gateway directory would identify, by graphical icons, the programmers and service providers offering various digital interactive services.[85] We find that NYNEX's proposed gateway directory is not inconsistent with our video dialtone rules because all customer-programmers on NYNEX's basic platform can choose to have their service listed on the NYNEX gateway directory.

34. For guidance to the parties in advance of the tariff review process, we note our view that the proposed one-year programming commitment contained in NYNEX's illustrative tariff appears to be unreasonable.[86] One of the goals of our video dialtone policy is to increase the diversity of video programming available to the public.[87] The ability of customer-programmers to provide programming on a less than full-time basis or for less than

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82 Compare Video Dialtone Order at n.146 with n.150.

83 NYNEX December 22, 1994 Ex Parte Letter at 2.

84 Id. at 1. NYNEX states that the information on the screen would scroll continuously.

85 Id. The set-top device would have the ability to send a subscriber-initiated signal upstream into the network, so that the network could establish a connection between the service provider and the subscriber. NYNEX analogizes this "routing function" to that performed by a LEC routing subscribers to their requested interexchange carrier.

86 Ameritech Operating Cos., Order and Authorization, FCC 94-340 at para. 30 (released Jan. 4, 1995) (Ameritech Order).

87 Video Dialtone Order at para. 1.

a year is an essential means of achieving that goal.[88] NYNEX has not presented any persuasive evidence demonstrating that it will experience increased difficulty filling the platform's capacity with programming, if programmers can take service for less than a year. While this would allow programmers to discontinue service more readily, it would also tend to increase the pool of potential programmers by permitting participation by programmers who wish to provide part-time programming, or those that could not commit to a one-year minimum service period. Therefore, we find that, at this point, NYNEX has offered no reasonable justification for its minimum service commitment. We will consider the reasonableness of any specific rate proposals or regulations for part-time programmers, such as requiring purchase of minimum time blocks, in the tariff review process. Certain other matters raised by parties, including, NYNEX's proposal for allocating common use equipment on the basis of service connections and its proposal for volume discounts for programmers, are not properly the subject of consideration during the Section 214 process. We expect to address those issues in the context of Part 69 waiver petitions or the tariff review process.

35. Under our video dialtone regulatory framework, in addition to regulated video dialtone service, LECs may offer non-regulated services and Customer Premises Equipment (CPE), including set-top devices,[89] subject to existing safeguards.[90] In response to NECTA's request for a clarification of the safeguards applicable to NYNEX's provision of non-regulated services in connection with their video dialtone platform, we note that NYNEX must provide set-top boxes, like other non-regulated CPE, on an unbundled basis, and that NYNEX's provision of video dialtone-related CPE and enhanced services is subject to our network disclosure requirements. We are confident that our existing safeguards governing the provision of non-regulated services by LECs, and particularly the BOCs, are adequate to prevent anticompetitive or discriminatory conduct.

36. IDCMA argues that the network interface devices proposed in NYNEX's applications may perform some sort of multiplexing function, and if so, should be classified as CPE and offered on an

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88 We note that, on some cable systems, programmers provide programming on a part-time basis, sharing cable channels with one or more programming services.

89 We recognize that the functions now performed by set-top devices may eventually be incorporated into television sets, computers or other kinds of CPE.

90 Video Dialtone Order at para. 58; Video Dialtone Reconsideration Order at para. 230.

unregulated basis.[91] It does not, however, ask that we deny this Section 214 application or condition any authorization that we may grant. In response to IDCMA's concern, the Common Carrier Bureau has requested that NYNEX provide further information on its network interface units (NIUs). If these NIUs are nonregulated CPE, NYNEX will be required either to obtain a waiver of Section 64.702 of our rules, or to unbundle the equipment.

37. For the reasons stated below, we reject NECTA's request that we prohibit NYNEX from imposing an end user access charge as premature. NECTA argues that NYNEX would have the ability to manipulate the access charge to "reduce or suppress subscriptions to the programmer-customer's services."[92] We do not believe that the Section 214 process is the proper forum in which to consider rate structure issues such as this. If NYNEX proposes an end user access charge for video dialtone, it first will have to obtain a waiver of our Part 69 rules. The waiver process will permit interested parties, including NECTA, to comment on this proposed rate structure. In addition, if a waiver is granted, NYNEX's end user access charge will be subject to scrutiny in the tariff review process. Therefore, we reject NECTA's request that we prohibit the end user access charge.

B. Section 214 Issues

1. Background

38. In the Video Dialtone Order, we determined that Section 214 of the Communications Act applies to telephone companies that seek authority to construct video dialtone facilities.[93] In order to grant an application for authorization under Section 214, the Commission must determine that a grant would serve the "public convenience and necessity."[94] Traditionally, the focus of the Section 214 review has been "to ensure that carriers prudently invest in equipment so as to avoid waste and unreasonably high rates" for telephone rate payers.[95] As part of the Commission's

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91 Ex Parte Letter from Jeffrey A. Campbell, IDCMA, to William F. Caton, Acting Secretary, FCC (Nov. 18, 1994).

92 NECTA Petition at 29.

93 Video Dialtone Order at para. 72; see also Video Dialtone Reconsideration Order at paras. 136-140.

94 47 U.S.C. § 214(a).

95 American Telephone and Telegraph, FCC 86-87 (released March 10, 1986)(AT&T Authorization), citing Statement of Senator Dill, 78 Cong. Rec. 8824 (1934).

rules specifying the contents of Section 214 applications, Subsection 63.01(m) requires the applicant to provide an "[e]conomic justification for the proposed project including. . . estimated added revenues and costs and the basis thereof."[96] Courts have found that this statutory standard "is to be construed so as to secure for the public the broad aims of the Communications Act," including the purposes expressed in Section 1 of the Communications Act. Administration of this standard is generally left to the Commission's discretion: "it is entirely within the Commission's discretion to accept even a minimal showing of financial justification" for approval of a Section 214 application.[97]

39. Traditionally, Section 214 authorizations have not required the level of detail demanded by petitioners. For instance, in AT&T Authorization we stated that "[g]enerally the Section 214 proceeding examines cost only insofar as it is necessary to determine, on a prima facie basis, whether costs are so substantial relative to benefits that the public interest would not be served by construction of the project."[98] Nor have we required the level of certainty demanded by petitioners. We have only required a finding that the estimates "do not appear unreasonable."[99] In examining an application for cable channel service, rather than denying the application, the Common Carrier

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96 47 C.F.R. § 63.01(m).

97 Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988) (Century Federal); see also General Telephone Company of the Southwest v. U.S., 449 F.2d 846, 846 (5th Cir. 1971)(General Telephone Co. of the Southwest). In FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953), the Supreme Court stated that the Commission need not "make specific findings of tangible benefit" or find "a demonstration of...immediate benefit to the public." The court, however, continued and stated that, "the Commission must at least warrant . . . that competition [resulting from the grant] would serve some beneficial purpose."

98 AT&T Authorization at para. 7.

99 In Pacific Bell, which involved common carrier construction of broadband transmission facilities for the holder of a non-exclusive cable franchise, the Common Carrier Bureau found that "[t]hese estimates do not appear unreasonable . . . . Century has not presented evidence warranting a finding that Pacific's request is prima facie unjustified or that a hearing is necessary." 60 RR 2d (P&F) 1175, 1180 (Com. Car. Bur., released July 22, 1986), recon. denied, 2 FCC Rcd 265 (1987), aff'd sub nom. Century Federal. See Dover Order, 9 FCC Rcd at 3685, para. 41.

Bureau conditioned its grant on a separate accounting of costs so that shareholders and not rate payers would bear the burden of failure.[100] In the early stages of the domestic satellite market, we stated that "[i]f a carrier waited until it was sure of a large demand for traffic, few stations would ever be built, while initial service demands go unsatisfied."[101]

40. In the Video Dialtone Reconsideration Order, we noted that, during the tariff reivew process, we would perform an in-depth examination of each LEC proposal and would determine both the "incremental costs associated with plant dedicated to video dialtone service" and what constitutes a "reasonable allocation of other costs associated with shared plant . . . and overheads." We added that "during this analysis we will consider among other things the effects of price changes on video dialtone demand." As we stated previously, however, the consideration of costs in a Section 214 proceeding is distinct from the examination of costs and rates in the tariff review process.

41. Finally, the Commission's review of a Section 214 application is not restricted merely to the financial aspects of the application. As stated above, the range of the Commission's inquiry into the "public convenience and necessity" is at least as broad as the purposes described in Section 1 of the Communications Act. In situations such as this, where the applicant proposes a new service and thus must necessarily rely on predictions of demand and revenues, which by their very nature cannot be certain, the Commission has found that the public interest benefits to be gained from the new technology may nonetheless support a grant of a Section 214 application.[102] Thus, in AT&T, where the applicant proposed supplementing existing facilities with a fiber lightguide cable, the Commission stated that "[t]his experience is necessary to foster the technological developments that will lead to 'learning curve' decreases in cost. Without experience in the early stages of development we may never see some of the advances that fiber technology promises to bring to telecommunications

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100 Wisconsin Bell, Inc., 56 RR 2d (P&F) 1262, 1267 (Com. Car. Bur. 1984) (Wisconsin), app. for review denied, FCC 84-618 (released Dec. 13, 1984), recon. denied, FCC 85-348 (released July 11, 1985). The Bureau concluded there that the basis of the applicant's revenue estimate was not "so suspect that it requires further investigation," and that the projections "do not appear unreasonable." Id. at 1267.

101 American Satellite Corp., 65 FCC 2d at 288.

102 See AT&T, 84 FCC 2d 303, 311 (1981).

users."[103] In Washington Utilities, the Commission considered the "public need and demand for the proposed facilities and services and for new and diverse sources of supply."[104] On appeal, the Ninth Circuit stated: "The crucial question is whether the Commission acted within its statutory authority in adopting a general policy favoring entry of new carriers rather than considering the costs and benefits of the specific proposal in each application. We hold that the Commission did act within its authority."[105]

42. We here find that NYNEX has provided sufficient information pursuant to our Section 214 filing rules, including economic justification, for us to find that the public convenience and necessity will be served by granting its applications. In addition, as is discussed in Subsection 4, infra, the proposed system should result in investment in advanced communications infrastructure, which can contribute to economic growth and the nation's leadership in technology. The system also promises competition in the local video distribution market, diversity of distribution sources and information, increased access to networks and new services, and greater access of program suppliers to consumers and of consumers to additional information services. All of these potential benefits can increase commercial opportunities and the flow of ideas. We conclude that the public interest will be served by grant of the applications, subject to the conditions specified below.

2. Economic Justification

Pleadings

43. NECTA and Cox contend that the Commission must reject NYNEX's applications for failure to satisfy the Commission's requirements for approving Section 214 applications in general, and video dialtone applications in particular.[106] NECTA, NCTA, and Cox

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103 Id. at 312.

104 Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules, First Report and Order, 29 FCC 2d 870, 920 (1971), pets. for recon. denied, 31 FCC 2d 1106 (1971), aff'd, Washington Utils. & Trans. Comm'n v. FCC, 513 F.2d at 1142, 1158 (9th Cir. 1975) (Washington Utilities).

105 Id. at 1161.

106 NECTA Petition at 2; Cox Reply at 6.

contend that NYNEX has not justified its proposal economically.[107]

44. Revenue Estimates. NECTA asserts that NYNEX's applications do not contain information sufficient to support its assertion that its proposed video dialtone investments are economically justified.[108] More specifically, Cox argues that NYNEX provides inadequate revenue information because it does not specify the percentage of revenues that will be paid by subscribers and programmers respectively.[109] Similarly, NCTA criticizes NYNEX for failing to provide revenue information broken down by service category.[110]

45. Petitioners also maintain that NYNEX's revenue estimates are unsupported and its assumptions unrealistic. For example, Cox contends that NYNEX's penetration and market share estimates are suspect.[111] According to Cox, NYNEX fails to explain how it expects its Rhode Island system to gain a 50 percent market share within five years of entering the market.[112] Cox further criticizes NYNEX for failing to explain how it determined that basic cable penetration rates will reach 87 percent within fifteen years.[113] In addition, NCTA criticizes NYNEX for relying excessively on projected revenues from digital interactive services and for failing to disaggregate these interactive revenues by service category.[114] NECTA suggests that the Commission, at a minimum, should require NYNEX to submit additional information in connection with its economic justification.[115]

46. In its opposition, NYNEX responds that the economic justification of its video dialtone project exceeds Commission requirements. According to NYNEX, the Commission has made clear that detail and certainty are simply not required, only that the

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107 NECTA Petition at 13; NCTA Petition at 13; Cox Petition at 5.

108 NECTA Petition at 13.

109 Cox Petition at 5-6.

110 NCTA Petition at 13-14.

111 Cox Petition at 6.

112 Id. at 8; see NECTA Reply at 21.

113 Cox Petition at 7.

114 NCTA Petition at 13-14.

115 NECTA Petition at 2.

estimated costs and revenues "do not appear unreasonable."[116] NYNEX further responds that its video dialtone market penetration, market share, and revenue forecasts are reasonable, given the new services and competitive dynamics video dialtone will introduce into the existing monopoly cable television market.[117] In addition, NYNEX disputes petitioners' assertions that its market share assumptions are "optimistic." It explains that its analysis was developed based on market studies and took account of the effect on competition of alternative video programming sources.[118] With respect to its estimate of digital interactive revenues, NYNEX asserts that its projections are reasonable and are supported by independent research and market studies.[119]

47. After the comment cycle closed, the Common Carrier Bureau, in a letter dated December 9, 1994, asked NYNEX to submit additional data concerning its economic justification. With respect to revenues, the Common Carrier Bureau asked NYNEX to provide further revenue data disaggregated by service category and by year. It also requested additional information on the number of homes passed, the estimated number of homes subscribing to various services, the estimated revenues from charges assessed on customer programmers, from transport charges and from other sources. Finally, it requested additional information concerning the methods and assumptions that NYNEX used to generate its revenue estimates.[120] NYNEX supplied the requested information on December 16, 1994.[121]

48. Petitioners subsequently submitted comments in response to NYNEX's data submission. The petitioners again dispute the adequacy of the information provided and the assumptions used in

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116 NYNEX Opposition at 23.

117 NYNEX Opposition (De Mauro Declaration at 2-5).

118 Id. at 3-4.

119 Id. at 5.

120 Letter to C. R. Carrington, Director-Federal Regulatory Matters, NYNEX Government Affairs from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, dated December 9, 1994 (hereinafter "Wallman Letter").

121 See Letter to William F. Caton, Acting Secretary, FCC from C.R. Carrington, Director-Federal Regulatory Matters, dated December 16, 1994 (hereinafter "NYNEX Supplemental Data Submission").

developing the estimates.[122] NECTA, for example, charges that NYNEX's submission omits revenue data on various video dialtone service categories and market share data for all categories except cable-like service.[123] Similarly, NCTA asserts that NYNEX's projected market shares of 40 and 50 percent in Massachusetts and Rhode Island lack credibility.[124] MCI questions NYNEX's estimates for revenues from digital interactive services, while NCTA questions NYNEX's "high" per subscriber revenues in the early years of deployment.[125] Finally, NECTA questions the reliability of NYNEX's revenue forecasts and points to previous instances where NYNEX overestimated the demand for new services.[126]

49. Cost Estimates. Petitioners similarly criticize NYNEX's cost estimates as inadequate and unsupported.[127] Cox claims that NYNEX's cost information is inadequate, that it provides no support for its estimates, and that the figures it does provide are suspect (e.g., Cox notes that NYNEX lists no installation costs for some equipment).[128] NECTA complains that NYNEX does not provide data on total common costs, the direct costs of telephony, or the percentage of common costs assigned to video dialtone services.[129]

50. Petitioners also criticize the amount of common costs NYNEX assigns to video dialtone. NCTA argues that in evaluating NYNEX's economic justification, the Commission should determine a proper allocation of common costs.[130] Cox argues that NYNEX would not be replacing its current network but for video dialtone, and

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122 See, e.g., NCTA Data Comments at 9-10; NECTA Comments in Response to NYNEX Data Submission (hereinafter "NECTA Data Comments") at 2 and Kravtin Declaration at 3-6; MCI Comments in Response to NYNEX Data Submission (hereinafter "MCI Data Comments") at 2-3.

123 NECTA Data Comments at 2.

124 NCTA Data Comments at 7-8.

125 MCI Data Comments at 2; NCTA Data Comments at 9-10.

126 NECTA Data Comments at 2.

127 See, e.g., Cox Comments at 9; Cox Reply at 7; NECTA Comments at 6; NECTA Reply at 15; NCTA Reply at 10.

128 Cox Petition at 9.

129 NECTA Petition at 6, 12 & Kravtin Declaration at 21; NECTA Reply at 15; see Cox Petition at 10.

130 NCTA Reply at 10.

that accordingly, all of the common costs of the HFC network should be assigned to video dialtone. It further asserts that even the costs of the "telephony only" parts of the HFC network should be treated as added video dialtone costs because they would not be incurred but for video dialtone.[131] Similarly, NECTA argues that the Commission needs to consider the total cost of building the proposed integrated network in order to determine whether NYNEX has allocated a reasonable proportion of common costs to video dialtone.[132] NECTA further contends that it would be more economically defensible to view the telephony portion of the integrated network as incremental to video and that the bulk of the direct and common costs therefore should be assigned to video dialtone.[133] Finally, NECTA asserts that network interface devices ("NIDs") should not be treated as a common cost.[134]

51. Petitioners also challenge NYNEX's use of the relative number of video dialtone and telephone service connections as the basis for assigning common costs to video dialtone and telephony.[135] NECTA, for example, argues that this method of assignment is inconsistent with the Commission's Part 36 jurisdictional separations rules because those rules specify that jurisdictional separations be made on the basis of "actual use."[136] Petitioners also argue that NYNEX's proposed method for assigning common costs would result in telephone ratepayers bearing a disproportionate share of the common costs. For example, Cox and NECTA argue that this assignment method would result in telephone ratepayers unfairly paying over twice the proportion of common costs that video dialtone customers would pay.[137] An additional inequity, according to Cox, is that all telephone ratepayers will have to pay the common costs regardless of their use of video dialtone services.[138] NECTA challenges NYNEX's classification of certain categories of construction costs as common costs. It disputes NYNEX's assumption that, because costs are shared, they cannot be directly assigned. It also argues that NYNEX's allocation of

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131 Cox Petition at 9.

132 NECTA Petition at 7, Kravtin Declaration at 3-4.

133 NECTA Petition at 7.

134 Id., Kravtin Declaration at 19.

135 NECTA Petition at 10-11; NCTA Reply at 13-14.

136 NECTA Petition at 10-11.

137 Cox Petition at i-ii, 3, 11; NECTA Petition at 5-6.

138 Cox Petition at 11.

common costs to video dialtone, which NECTA asserts will be "at most, only about 25%" of all common costs, is unreasonable.[139] Finally, Cox states that the HFC network is not in the public interest if it is subsidized by assigning significant costs to telephone ratepayers that neither want nor need the extra services NYNEX proposes.[140]

52. With respect to the adequacy of its cost data, NYNEX responds that its cost data fully comply with the Commission's requirements. NYNEX claims that it has supplied detailed estimates of the added construction costs by account for its proposed video dialtone system. NYNEX asserts that, in fact, it has gone beyond the Commission's requirements and supplied an allocation of common and overhead costs to video dialtone.[141] Responding to Cox's claim that NYNEX's cost information failed to list installation costs for some equipment, NYNEX states that, in some cases, its vendor contracts for capital items were all inclusive and did not separate installation costs.[142]

53. NYNEX also challenges the arguments that a greater percentage of common costs, or that all common costs, should be recovered from video dialtone services. NYNEX contends that the added revenues from the proposed video dialtone projects "will not only cover added (incremental) construction costs including a reasonable allocation of common costs, but also cover a fair allocation of overhead costs."[143] More specifically, NYNEX argues that since the proposed network will support both existing and future services and lowers the cost of maintaining and providing current services, it would be economically incorrect to require that the incremental costs of the network be recovered entirely from only one of the new services that the network will make possible. Instead, it asserts that each service should recover its incremental costs, and together, the revenue from all services must recover the incremental cost of the network. NYNEX goes on to state that, from an economic point of view, common or shared costs cannot be directly assigned to a service because direct assignment implies the attribution of costs by cost causation. It adds that, as long as the incremental revenues from video dialtone service exceed the "incremental -- directly, cost-causally assigned -- costs" of video dialtone service, all customers will be better off

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139 NECTA Petition at 10.

140 Cox Reply at 8.

141 NYNEX Opposition at 25 & n.75.

142 Id. at 26.

143 NYNEX Opposition at 25.

if the service is provided.[144] NYNEX also challenges the petitioners' contention that NYNEX's methodology for allocating video dialtone common costs is inconsistent with the Commission's existing Part 36 jurisdictional separations rules. NYNEX maintains that in general petitioners either misunderstand or misstate the fundamental principles that underlie the Commission's separations rules.[145]

54. Replying to NYNEX's argument that video dialtone services need only recover their incremental costs, NECTA argues that NYNEX presents no evidence that would enable the Commission to conclude that the "resulting incremental and allocated common costs for telephone service in the HFC network will be lower than in the current network," and it argues that the weakness in NYNEX's argument is that the proposed HFC network is not already in place. NECTA adds that lower maintenance costs must be weighed against higher capital costs.[146] In addition, NECTA argues that the incremental cost of video dialtone should include costs of some of the common plant when the decision to provide video dialtone services was the underlying motive for the HFC network.[147] Finally, Cox asserts that NYNEX's monopoly over telephone service undercuts NYNEX's argument that the allocation of common costs is reasonable if services are priced so that each makes a maximum contribution to the earnings of the firm. It contends that NYNEX's theory does not hold because there are no competitors in telephony to keep rates for telephone service at market prices.[148]

55. In its December 9 request for additional information, the Common Carrier Bureau requested NYNEX to supply additional cost data. The requested data included investment costs disaggregated by year and by investment category and expenses disaggregated by year and by expense category. The Common Carrier Bureau also asked NYNEX to explain the assumptions and methodologies it employed in generating this data.[149] NYNEX supplied the requested information on December 16, 1994.[150]

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144 Id. at 32, Taylor Affidavit at 7.

145 Id., Schweikert Declaration at 1-9.

146 NECTA Reply at 5-6.

147 Id. at 8-9.

148 Cox Reply at 7-8.

149 See Wallman Letter.

150 See NYNEX Supplemental Data Submission.

56. Petitioners made several criticisms of NYNEX's supplemental data submission.[151] Cox argues that the fundamental flaw in NYNEX's cost submission is that it ignores the fact that NYNEX has a functional telephone network already in place. Cox contends that this oversight causes NYNEX to over-allocate costs to telephone ratepayers in two ways. First, Cox asserts that NYNEX treats as common costs various costs that would not be incurred but for NYNEX's entry into the video market. Secondly, Cox argues that NYNEX's cost presentation over-allocates costs it identifies as common costs to telephone rate payers.[152] MCI, expressing concern about the potential for increased telephony rates, also argues that NYNEX fails to allocate common costs of video dialtone service in a reasonable manner.[153] NCTA claims that there are two problems with NYNEX's expense methodology: (1) NYNEX's expenses are allocated based on a flawed common capital expense allocator; and (2) NYNEX has used expense factors based on the cost of maintaining the existing network, while maintenance costs of the HFC network, NCTA asserts, will be greater.[154] Finally, NCTA contends that NYNEX's investment data are unusable because the data do not detail the dedicated investment for telephony. It also suggests that the initial investment required before the first subscriber is served should be higher than NYNEX's estimates.[155]

57. Cash Flow Analysis. Petitioners also criticize NYNEX's fifteen year cash flow analysis which it submitted as part of its economic justification. NECTA argues that NYNEX violated accepted financial principles when it improperly amortized capital expense over 15 years. This, NECTA contends, leads to a gross understatement of the true capital expense. NECTA adds that, while NYNEX states that the bulk of the $90 million investment would be made during the first four years, the bulk of capital expense does not appear in the early years of NYNEX's cash flow analysis.[156] NECTA also claims that fifteen years is an excessively long period for recovery of the costs of the proposed facilities and that 11.25 percent is too low a discount rate for an investment that will take

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151 See Cox Data Comments; MCI Data Comments; NCTA Data Comments; NECTA Data Comments.

152 Cox Data Comments at 2.

153 MCI Data Comments at 3.

154 NCTA Data Comments at 14-15.

155 Id. at 15-16.

156 NECTA Petition at 14-16.

fifteen years to pay off.[157] Shifting the timing of investment flows and using a shorter study period, NECTA also presents alternative cash flow analyses that yield negative present values.[158] Finally, MCI compares NYNEX's projection that it will achieve a positive cash flow in 9 years in Massachusetts and 12 years in Rhode Island with the requirement, established in the AT&T Price Cap order,[159] that AT&T have a positive cash flow for new services within three years.[160]

58. In response, NYNEX denies that it has amortized capital expenditures or capital-related expenses. It explains that its cash flow analysis contained only expected actual cash outlays and excluded depreciation and return on investment.[161] NYNEX also challenges NECTA's argument that the build-out of video dialtone facilities must occur within the first few years to support its demand projections. NYNEX avers that expenditures to design and engineer the video dialtone network are driven by subscriber demand, and are properly matched with the rise in projected revenues.[162] In addition, NYNEX disputes NECTA's assertion that NYNEX's fifteen-year economic study period is unreasonably long. It states that the 15 year period is quite reasonable because video dialtone is a nascent service that will compete with existing cable monopoly services.[163]

Discussion

59. We conclude that a conditioned grant of the NYNEX applications will serve the public convenience and necessity and thus satisfy the requirements of Section 214. We find that NYNEX's showings of economic justification satisfy the requirements of the statute and our regulations. Our statutory finding is premised as well on the public interest benefits we find in the construction of these video dialtone systems and on our imposition of conditions in this authorization for a separate accounting of the costs of these

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157 Id. at 18, n.42.

158 Id. at 18; Kravtin Declaration at 12-13, Table A.

159 Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3125 (1989).

160 MCI Data Comments at 4.

161 NYNEX Opposition at 26-27.

162 Id. at 27.

163 Id.

video dialtone systems. As part of our examination, we have reassessed the adequacy of our safeguards as applied to these specific Section 214 applications, and conclude that our existing safeguards, in conjunction with the conditions we impose on this authorization, will be sufficient to protect against possible anticompetitive conduct by NYNEX.

60. NYNEX has provided a reasoned basis for its estimated video dialtone revenues. As we explain below, these revenues should not only recover all the dedicated investment and associated expense of its video dialtone service, but also make a significant contribution to covering the common costs and overheads of the integrated broadband network.

61. Contrary to the petitioners' claims, NYNEX, in its supplemental data submission, has provided sufficiently detailed and adequately supported revenue and cost data for the Commission to grant the applications. NYNEX has submitted detailed revenue estimates disaggregated by year and by service category and has proferred a reasonable explanation of the assumptions and methods it used to generate these estimates.[164] NYNEX has also provided year-by-year direct and common investment and expense cost estimates. In addition, NYNEX has presented these estimates restated in cash flow terms.[165] Investment estimates are further disaggregated into network components, and expense cost estimates are broken into the Commission's Uniform System of Accounts[166] (USOA) categories.[167]

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164 See NYNEX Supplemental Data Submission, response to Question 1 and Table QEST1V4.XLS.

165 A cash flow analysis adjusts for the timing of investment, expense and revenue by discounting the data by the opportunity cost of capital (discount rate) and restating them in net present value terms. This adjusts for the fact that cash flows in the present are more valuable than those in future periods because they can be invested at positive interest rates. Expressing cash flows in net present value terms is especially important where large investments must be made before revenues can be realized. See generally R. Brealey & S. Myers, Principles of Corporate Finance 12-13, 93-98 (3d ed. 1988); H. Bierman, Jr. & S. Schmidt, The Capital Budgeting Decision: Economic Analysis of Investment Projects (8th ed. 1993) at chapter 2.

166 See generally 47 C.F.R. § 32.

167 See NYNEX Supplemental Data Submission, response to Question 1.

62. Revenue Estimates. We find that NYNEX has proffered a reasoned basis for its revenue estimates. Relying on proprietary market research conducted by NYNEX and on secondary market research studies, NYNEX projects video revenues from two sources -- broadcast and interactive services. In Rhode Island, broadcast services represent 63 percent of total forecasted revenues; in Massachusetts they represent 55 percent.[168] Forecasted broadcast revenues are based on projections of end user charges and transport charges for analog and digital services paid by the video information programmers ("VIPs"). Interactive service revenues are based on per minute-of-use charges for end user access to the video dialtone platform and charges to VIPs that will include rental fees for access to the platform.[169]

63. NYNEX's subscriber demand for broadcast services was developed based on three factors: projected penetration for cable service; planned video dialtone deployment (i.e., homes passed); and market share forecast.[170] NYNEX projects that multichannel video distribution penetration rates will rise from 71 percent to 87 percent over the next fifteen years based on normal growth and intensified competition among all forms of multi-channel broadcast services (i.e., cable, video dialtone, wireless, and satellite alternatives).[171] NYNEX further estimates that its proposed video dialtone system will eventually pass 334,000 homes in Massachusetts and 63,000 homes in Rhode Island.[172] Finally, NYNEX estimates that VIPs using the video dialtone platform would collectively achieve within five years a market share of 40 percent in Massachusetts, where there is a more competitive market, and a 50 percent market share in Rhode Island.[173] Based on these and other assumptions (e.g., VIP demand, subscriber turnover rates, and projected prices) NYNEX estimates year-by-year revenues for video dialtone transport

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168 Staff calculation based on NYNEX Supplemental Data Submission (Table QEST1V4.XLS). The percentage of total forecasted revenue from broadcast services was calculated as: the present value of analog broadcast transport, digital broadcast transport and subscriber access charge revenues divided by the present value of total forecasted revenues. All fifteen years of the study period were used. The discount rate was 11.25 percent.

169 NYNEX Supplemental Data Submission, response to Question 1.

170 Id.

171 Id.

172 Id.

173 Id.

and subscriber access. Dividing projected revenues by the projected number of subscribers yields monthly per subscriber revenues ranging from approximately $19 in Massachusetts and $21 in Rhode Island in 1998 to $9 in Massachusetts and $12 in Rhode Island in 2009.[174] NYNEX cites a plethora of marketing studies upon which it relied in developing its assumptions. Petitioners, on the other hand, have not presented evidence that persuades us to reject NYNEX's underlying assumptions. We take particular note that NYNEX's estimates of per-subscriber broadcast revenues reasonably decline over the study period as competition among broadcast service providers intensifies. We further note that NCTA's argument that per-subscriber revenues are too high in the early years of the study period ignores two facts. First, these per-subscriber revenues include charges to programmer-customers that are based on the number of homes passed, rather than the number of subscribers. Thus in early years, when the number of subscribers is relatively low in comparison to the number of homes passed, the revenues per subscriber appear high. Over time, as the penetration rate of homes passed increases, revenue per subscriber will decline. Second, NYNEX's plan to offer volume discounts to programmer-customers will result in lower per subscriber revenues as the number of subscribers increases.[175] We therefore find that NYNEX has provided a reasoned basis for its assumptions and its estimated revenues.

64. With respect to digital interactive services, NYNEX develops separate revenue forecasts for a list of anticipated services including, inter alia, movies-on-demand, games, home shopping, information services, and training and education services.[176] For each service, NYNEX develops a separate forecast of projected revenues based on the expected service introduction date (adoption rates), service popularity (maximum take rates), and expected usage levels. The projections also consider price points derived from secondary market research studies. NYNEX estimates that by year 2009, 86 percent of video dialtone subscribers will take one or more interactive services, and that approximately 25 percent of their average weekly television viewing hours will be

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174 Staff Calculation based on NYNEX Supplemental Data Submission (Table QEST1V4.XLS). See Ex parte NYNEX erratum (filed Dec. 23, 1994). Broadcast revenue per subscriber was calculated as: the sum of analog broadcast transport, digital broadcast transport and subscriber access charge revenues divided by the number of broadcast residential subscribers. The result was divided by twelve to place it on a monthly basis.

175 NYNEX Applications, Exhibit G (Illustrative Tariff) at z-124, z-126.

176 Id. at 4.

devoted to such services.[177] NYNEX forecasts average monthly per-subscriber revenues for digital interactive services of $13 in 1998 and $28 in 2009 in Massachusetts, and $11 in 1998 and $28 in 2009 in Rhode Island.[178]

65. NYNEX's digital interactive offerings will bring new and innovative services to NYNEX's customers. We note that it is difficult to find comparable services from which to derive revenue estimates and that there is greater uncertainty inherent in these projections. Nevertheless, we believe that giving little or no weight to these future services would bias our facility authorization process against facilities intended to offer promising as well as proven services. Considering new services is consistent not only with our stated goal in this proceeding of encouraging "efficient investment in the national telecommunications infrastructure,"[179] but also with our long-standing policy in Section 214 proceedings of encouraging investment in facilities for new services. As we stated in American Satellite Corp., "carriers . . . must presently rely, at least to some extent, on speculative traffic projections in deciding whether to construct any element of a satellite system," and "[i]f a carrier waited until it was sure of a large demand for traffic, few stations would ever be built, while initial service demands go unsatisfied."[180]

66. NYNEX's projected interactive revenues are based on a systematic effort to quantify the expected demand for widely anticipated future services. We note that petitioners assert that NYNEX's estimates are excessive, but present no firm data to persuade us that NYNEX's methods or assumptions are unreasonable. Contrary to NECTA's claim that NYNEX failed to supply the requested revenue data, we find that NYNEX in fact did supply revenue estimates for the service categories we specified. We did not

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177 Id.

178 Staff calculations based on NYNEX Supplemental Data Submission (Table QEST1V4.XLS). See Ex parte NYNEX erratum (filed Dec. 23, 1994). Digital interactive revenue per subscriber was calculated as: digital interactive transport revenues divided by the number of interactive subscribers. Monthly revenue was obtained by dividing by twelve.

179 Video Dialtone Reconsideration Order at para. 3.

180 American Satellite Corp., 65 FCC 2d at 288. See also AT&T Co., 84 FCC 2d at 311 ("Without experience in the early stages of development we may never see some of the advances that fiber technology promises to bring to telecommunications users.").

request revenue estimates for individual interactive services because we believed that increased specificity about future services (in contrast to projections about existing services) would not increase the credibility of the estimates given the inherent uncertainties involved. In addition, with respect to market share, we note that NYNEX implicitly makes a market share assumption since it applies its forecast for interactive services to only its share of video customers. Moreover, we reject claims that NYNEX's estimated market share is not credible. We believe that NYNEX has provided a reasoned basis for its market share estimates for broadcast services, given NYNEX's survey evidence of significant interest by cable subscribers in an alternative provider if the price of service is the same, and the wide variety of service offerings that will be available on the common carrier platform.[181] Finally, we decline to reject NYNEX's revenue forecasts in this instance based on allegations that NYNEX, in the tariff review process, has forecasted demand for new services that exceeded subsequent actual demand. NECTA has not identified a specific flaw that may have caused NYNEX's earlier estimates to be inflated that is also present here. Moreover, as we previously noted, we have examined the assumptions and methodologies underlying NYNEX's estimates and have found that NYNEX provided a reasoned basis for them. Accordingly, we find that the record in this proceeding does not give us a basis for not allowing NYNEX to rely upon forecasts of interactive digital service revenues in supporting its economic justification.

67. Cost Estimates. NYNEX submits data identifying various cost categories for its proposed integrated broadband networks. These cost data are broken down by year and into investment and expense categories. Investment estimates are further disaggregated into network components, and expense cost estimates disaggregated into the Commission's USOA functional cost categories. NYNEX also provides a cash flow analysis, using the Commission's prescribed cost of capital for regulated interstate services.

68. NYNEX anticipates approximately $28 million in dedicated video dialtone investment in Massachusetts and approximately $10 million in Rhode Island.[182] NYNEX also forecasts approximately $46 million in dedicated operating expenses in Massachusetts and approximately $17 million in Rhode Island over the fifteen-year

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181 NYNEX Opposition (DeMauro Declaration at 2-5).

182 Staff calculation based on NYNEX Supplemental Data Submission (Table QEST10V4.XLS). Total dedicated video dialtone investment is the present value of direct capital expense over the 15-year study period. The discount rate is 11.25 percent.

study period.[183] In addition, NYNEX identifies a portion of the "common" investment and expense associated with video dialtone service.[184] It is clear that NYNEX's common network facilities will be used to provide video dialtone, telephony, and other services. We reject arguments that, as part of the Section 214 process, we should require NYNEX to identify all total common costs and telephony dedicated costs, or that we establish a minimum percentage of common costs that must be recovered by projected video dialtone revenues. As we noted in the Video Dialtone Reconsideration Order, we will determine in the tariff review process the appropriate allocation of common costs to be recovered in rates for video dialtone service.

69. We find Cox's concern that all common costs will be recovered from telephone ratepayers misplaced. Interstate telephone rates are set under our price cap rules and are not based on the changes in the costs allocated to telephony. Under our price cap regime, unlike rate-of-return regulation, an increase in costs does not result in an increase in rates and revenues. Instead, any increase in service costs will reduce the LECs' profits from telephone service. Thus, LECs have an incentive to minimize their cost of providing telephone service.[185] In addition, as we noted in our Video Dialtone Reconsideration Order, "neither our decisions in this proceeding nor our actions on the various video dialtone Section 214 applications preempt the state commissions from disallowing from local telephone service rates any video dialtone-related costs that do not meet their own standards for inclusion in rates."[186]

70. Finally, we find no support for NCTA's argument that NYNEX has underestimated the initial investment that is required before the first subscriber is added. NYNEX states that its investment in video central office equipment will be driven by the

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183 Staff calculation based on NYNEX Supplemental Data Submission (Table QEST8V4.XLS). Total dedicated video dialtone operating expense is the present value of direct operating costs over the 15-year study period. The discount rate is 11.25 percent.

184 NYNEX states that it assigns common costs between video dialtone services and telephony based on the relative number of service connections. See, e.g., NYNEX Supplemental Data Submission, response to Question 5.

185 See infra para. 86.

186 Video Dialtone Reconsideration Order at para. 191 n.311.

growth in subscribership.[187] We also note that NYNEX's investment data indicate that it expects to invest $3.9 million in video hub facilities and transport in Massachusetts to pass less than 32,000 homes during year one, and a total of $9.7 million to pass approximately 217,000 by the end of year three.[188] Finally, we are not persuaded by NECTA's assertions that the NID is not needed for a telephony-only network; that it is a relatively complex network interface device used only in new networks because of the joint provision of video and voice services; and that it should therefore be classified as a video dialtone direct cost. On the contrary, based on NYNEX's description, NYNEX's proposed NID does not appear to be significantly more complex then the NIDs commonly found in telephony-only systems.[189] Moreover, the NID appears to be a common or shared device that is needed for both services.

71. NYNEX's cash flow analysis indicates that it will recover direct investment and operating expenses of its dedicated VDT facilities in the fourth year in Massachusetts and in the sixth year in Rhode Island.[190] NYNEX's cash flow analysis for Massachusetts further demonstrates that the net present value of revenues minus dedicated costs exceed $36 million at the end of ten years and $62 million at the end of fifteen years. For Rhode Island, NYNEX's cash flow analysis indicates that the net present value of revenues minus dedicated costs exceed $6 million after ten years and $13 million after fifteen years. Over a fifteen year period, the net present value of revenues minus dedicated costs

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187 Letter to William F. Caton, Acting Secretary, FCC, from C.R. Carrington, Director-Federal Regulatory Matters, NYNEX Government Affairs, dated Sept. 1, 1994.

188 Staff calculation based on NYNEX Supplemental Data Submission (Table QEST5V4.XLS). Investment in video hub facilities and transport at the end of year 3 is the undiscounted sum of the three years of investment.

189 Massachusetts Application, Exhibit B at 4.

190 Staff calculation based on NYNEX Supplemental Data Submission (Table QEST10V4.XLS). Net cash flow was determined by subtracting direct capital investment and direct operating costs from revenues. The cumulative present value of the net cash flow was calculated for each year of the study period using an 11.25 percent discount rate. The recovery period of direct capital and operating costs was measured as the number of years that elapsed before the cumulative, discounted net cash flow became a positive number.

exceed $75 million for both service areas.[191]

72. We find no basis for NECTA's allegations concerning irregularities in NYNEX's cash flow analysis. We reject its argument that NYNEX's fifteen year study period is too long.[192] The fifteen year study period is simply the period of time for which NYNEX presented data in the cash flow analysis of its economic justification.[193] Varying the length of a study period does not affect the break even point or the discounted payback period of a cash flow analysis. Nor does it affect the net present value of a prospective investment at the end of a specified term, such as ten years. In its application, NYNEX chose a fifteen year study period, which is longer than some other applicants, but this choice does not affect the conclusion that the facilities will recover their dedicated costs in four years in Massachusetts and in six years in Rhode Island. With respect to MCI's argument that NYNEX's proposed facilities do not generate a positive cash flow within three years, we note, first, that, if one uses dedicated costs, NYNEX's proposed facilities generate a positive cash flow in Year 2, and second, that there is no requirement in Section 214 proceedings that a proposed facility generate a positive cash flow within three years. Rather, we only require some showing that the expected revenues from the proposed facility will at least cover the added costs within some reasonable period of time. Accordingly, we find that NYNEX has provided a reasoned basis for its showing that its anticipated revenues from the proposed facilities will significantly exceed the dedicated video dialtone costs within a reasonable period of time.

73. We need not reach NCTA's argument that the Dover standard is inappropriate, because NYNEX has shown that its projected revenues will recover not only the VDT dedicated costs but also contribute significantly to the common cost of the proposed broadband network. We also reject NCTA's contention that the Video Dialtone Reconsideration Order changed the standard for Section 214 video dialtone applications. As we explained in the Ameritech Order, the discussion of information we would require for video dialtone tariffs in the Video Dialtone Reconsideration Order in no way affects the standard we will use in Section 214 proceedings.[194]

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191 Staff calculation based on NYNEX Supplemental Data Submission, Table QEST10V4.XLS.

192 NECTA Data Comments at 18 & n.42.

193 In comparison, Ameritech, Bell Atlantic, and U S WEST used a ten-year study period, while Pacific Bell used a twenty-year study period.

194 Ameritech Order at para. 68.

Similarly, in requesting supplementary data from NYNEX, we did not intend to change the standard for evaluating economic justifications under Section 214.

74. Based on its economic justification, and in particular its cash flow analysis, we find that NYNEX has presented a reasoned basis for its projections. We further find that NYNEX's projected video dialtone revenues will sufficiently exceed video dialtone dedicated costs, so as to make a significant contribution to the common cost of the proposed broadband network.[195]

3. Cross-Subsidy Issues

Pleadings

75. Several petitioners argue that granting NYNEX's applications will result in telephone service rate payers improperly subsidizing video dialtone services.[196] Specifically, they contend that the financial data submitted by NYNEX is so cursory that it prevents the Commission from granting its application and ensuring that captive telephone rate payers will not assume the costs of NYNEX's video dialtone service investment.[197] NCTA and NECTA maintain that existing cross-subsidization safeguards are inadequate and request that the Commission adopt safeguards specifically designed for video dialtone service offerings prior to authorizing NYNEX's 214 applications.[198] NCTA argues, inter alia, that the Commission should establish: (i) a federal-state joint board to set a jurisdictional allocation for joint plant used in the provision video dialtone and telephony; (ii) a cost allocation methodology for LECs to use in allocating common and overhead costs; (iii) cost accounting rules that separate video and telephony costs into separate video and telephone subaccounts; (iv) procedures that enable the Commission to separate the costs of nonregulated services from both the costs of telephony services and the costs associated with the basic video dialtone platform; (v) a separate access charge category for video dialtone and a separate basket for video dialtone under price cap

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195 We note that the findings we make today are not intended to establish minimum standards for an economic justification necessary to approve a Section 214 video dialtone application. Rather we only find that NYNEX has justified our authorization of these specific proposed facilities.

196 NCTA Petition at 15; Cox Petition at 11-13; NECTA Petition at 5-13; NECTA Reply at 14-15; MCI Data Comments at 5.

197 See supra para. 48-49.

198 NCTA Petition at 15-19; NECTA Petition at 5.

regulation.[199] NCTA also contends that before considering NYNEX's applications we should establish safeguards that limit the joint marketing of basic telephone service and video dialtone, and adopt new rules to prevent LECs from gathering and marketing information on subscriber television viewing patterns to customer-programmers and others.[200]

76. Challenging NYNEX's claim that price cap regulation will prevent cross subsidization, MCI argues that nonprofitable video dialtone services will result in higher interstate telephone rates. MCI contends that the fact that NYNEX's video dialtone service will not provide a positive cash flow for almost ten years, combined with the price-cap sharing/low-end adjustment mechanism, will result in higher telephone rates.[201] Cox contends that the requirement, under the Commission's price cap plan, that LECs return to customers half of earnings in excess of 12.25 percent creates an incentive for LECs to shift costs to telephony from other services in order to reduce overall regulated interstate earnings below the 12.25 percent threshold.[202]

77. MCI also argues that permitting NYNEX to offer video dialtone services may result in an increase in intrastate telephone rates. In states that have rate-of-return regulation, MCI argues that the higher costs resulting from video dialtone will place upward pressure on intrastate rates. In states with price cap regulation, the higher costs will result in reduced sharing.[203]

78. Finally, NCTA argues that requiring NYNEX to recover the long-run incremental costs of video dialtone from video dialtone service offerings will not necessarily prevent NYNEX from improperly subsidizing its video dialtone services at the expense of telephone ratepayers. According to NCTA, there are two parts to the cross-subsidy test: (1) all services must recover at least their long run incremental costs; and (2) no service can be priced above its stand alone cost.[204] NCTA claims that, even if NYNEX demonstrates that its video dialtone service will recover its long run incremental cost, there remains a danger that rates for telephone service with the HFC broadband network will exceed the

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199 NCTA Petition at 15-19.

200 NCTA Petition at 19.

201 MCI Data Comments at 5.

202 Cox Petition at 8.

203 MCI Data Comments at 5.

204 NCTA Data Comments at 9-10.

stand alone costs of a network designed to provide only narrowband services.[205]

Discussion

79. We note that the concerns expressed by the petitioners regarding the potential for cross-subsidization in NYNEX's video dialtone service offerings were generally raised before the Commission released its Video Dialtone Reconsideration Order. In the Video Dialtone Reconsideration Order, we addressed these issues at length and affirmed our commitment to implement video dialtone in a manner that does not subject basic telephone rate payers to unreasonable rate increases or allow improper cross-subsidization.[206] We find that the petitioners opposing NYNEX's applications do not raise arguments or issues concerning video dialtone cross-subsidization that were not addressed by this Commission in the recent video dialtone reconsideration proceeding. Nevertheless, we will summarize below the relevant findings we made in the video dialtone reconsideration proceeding.

80. In the Video Dialtone Reconsideration Order, the Commission determined that video dialtone service offerings by LECs subject to price cap regulation are subject to existing price cap rules. The Commission stated that these rules, and not the Part 36/Part 69 cost allocation scheme, are our primary means of protecting telephone customers of price cap LECs from subsidizing video dialtone service and paying unreasonably high rates.[207] We stated in the Video Dialtone Reconsideration Order that video dialtone service would be classified as a "new service" under our price cap rules, and tentatively concluded that a separate price cap basket for video dialtone service should be established in a further proceeding.[208] Moreover, the Video Dialtone Reconsideration Order, details how the tariff review process will protect telephone ratepayers against LEC video dialtone cross-subsidization. The order makes clear that, in tariffing a new video dialtone service, LECs are required to include in their revenue requirement

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205 Id. at 10.

206 Video Dialtone Reconsideration Order at paras. 214-223.

207 Id. at para. 166.

208 On February 7, 1995, the Commission initiated this proceeding by adopting a Notice of Proposed Rulemaking proposing a separate video dialtone price cap basket. See Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Further Notice of Proposed Rulemaking, FCC 95-49 (released Feb. 15, 1995).

submissions a reasonable allocation of common costs and overhead expenses.[209]

81. In the Video Dialtone Reconsideration Order, we adopted additional mechanisms to prevent cross-subsidization. For example, we required LECs offering video dialtone to establish two sets of subsidiary accounting records[210] to assist the Commission and the states in ensuring that video dialtone costs are not improperly recovered in telephone service rates.[211] In addition, we required LECs to revise their Cost Allocation Manuals (CAMs) for nonregulated services prior to providing nonregulated products or services related to video dialtone directly.[212] We stated that this would assist state regulators and other interested parties in tracking video dialtone-related CAM filings and help prevent cross-subsidization.

82. The Commission, in the Video Dialtone Reconsideration Order, declined, however, to amend Parts 32, 64, 36, and 69 of its rules before authorizing video dialtone services.[213] We found that the Uniform System of Accounts (Part 32) was designed to remain stable in the face of major changes in network technology and service offerings, and we therefore concluded that permanent changes in our accounting system were not required for video dialtone. Similarly, we declared that the Joint Cost Rules (Part 64) were specifically designed so that a variety of new nonregulated services could be introduced without the need to adopt

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209 Under the price cap "new services" test for video dialtone, LECS are required to identify (1) all direct costs associated with video dialtone, including plant dedicated to video dialtone service; (2) any incremental costs associated with shared plant used to provide video dialtone and other services; and (3) other costs associated with shared plant used to provide video dialtone and other services. The rates for video dialtone service must also include a reasonable allocation of common costs and overhead expenses. The evolution of the LEC price cap new services test and its application to video dialtone services is discussed in detail in the Video Dialtone Reconsideration Order at paras. 209-223.

210 Video Dialtone Reconsideration Order at para. 171.

211 We note that the Commission also authorized the Bureau to issue Responsible Accounting Officer (RAO) letters, if necessary, to ensure uniform accounting treatment of video dialtone costs. Id. n.322.

212 Id. at para. 181.

213 Id. at para. 162.

new cost allocation rules. With respect to jurisdictional separations rules (Part 36), we found that current jurisdictional separations rules could be used to separate video dialtone investment between the state and federal jurisdictions and that it was premature to institute Federal-State Joint Board proceedings to amend Part 36 during the initial phase of video dialtone deployment.[214] Finally, we declined to prescribe a new Part 69 rate element for video dialtone at the present time, but rather required that each LEC wishing to offer video dialtone services file a petition for waiver of our Part 69 rules prior to the establishment of a permanent video dialtone rate structure.[215]

83. In the Video Dialtone Reconsideration Order, we also affirmed our decision to permit LECs to engage in joint marketing of basic and enhanced video dialtone services, as well as basic video and nonvideo services.[216] We found that joint marketing can increase customer awareness of video dialtone and of enhanced features and functions offered over LEC video dialtone networks. This, we stated, would benefit both consumers and video programmers, and would increase usage of LEC video dialtone systems. Moreover, we stated that the record did not support a finding that joint marketing of video and telephony services would give LECs an anticompetitive advantage over other providers of video programming to end users.

84. Finally, we affirmed our decision to apply existing customer proprietary network information (CPNI) rules to video dialtone.[217] We required, however, that the BOCs and GTE, the carriers to which our CPNI rules currently apply, provide the Commission with additional information about the kinds of CPNI to which they will have access as a result of providing video dialtone service. We explained that this will enable us to obtain a better record to assess whether existing CPNI rules best balance the various interests that are implicated by the use of CPNI in the video dialtone context.

85. Thus, for the reasons set forth in the Video Dialtone Reconsideration Order, we reject the petitioners' contentions that we adopt video dialtone-specific safeguards to prevent cross-subsidization. We also reject suggestions that we prohibit LEC joint marketing and amend our existing CPNI rules in this Section 214 proceeding.

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214 Id. at paras. 186-92.

215 Id. at paras. 195-99.

216 Id. at para. 239.

217 Id.

86. We are not persuaded to take additional action at this time by MCI's argument that interstate access rates may be higher than they otherwise would be due to construction of the proposed facilities. MCI alleges that this may occur as a result of the LEC price cap sharing/low-end adjustment mechanism, which reflects earnings on rate base. Under the LEC price cap plan, LECs have a strong incentive to make profit maximizing and cost minimizing decisions. To the extent that the sharing/low-end adjustment mechanism creates a risk that ratepayers could pay telephone rates higher than they otherwise would be as a result of video dialtone investment, LEC shareholders bear a significantly greater risk of reduced earnings. Thus, LECs are very unlikely to undertake this investment unless the prospective investment appears profitable. In addition, we have sought comment on the proper relationship between video dialtone and the sharing/low-end adjustment mechanism, along with other video dialtone price cap questions in a Further Notice in the LEC price cap performance review proceeding.[218] We believe that the issue raised by MCI is best addressed in that context.

87. We also reject MCI's argument that NYNEX's proposed video dialtone facilities will increase intrastate telephone rates.[219] MCI does not raise any new issues or introduce any new facts that we did not consider in the Video Dialtone Reconsideration Order. In that order we stated that state commissions bear primary responsibility for ensuring that intrastate rates are reasonable, and that, in reviewing proposed local telephone service rates, they have the authority to disallow any video dialtone-related costs that do not meet their own standards for inclusion in rates.[220] We also stated, however, that we would take measures to monitor intrastate costs and rates to ensure that local telephone ratepayers are not harmed by the advent of video dialtone, and that we would report our findings so that we and state regulators can determine when and if rule changes or other actions appear necessary.

88. Finally, we reject NCTA's suggestion that even if video dialtone revenues recover the incremental costs of video dialtone service, telephone rates may nevertheless rise above the stand-alone costs of a network designed to provide narrowband services. Initial rates established under our LEC price cap rules were based

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218 See Price Cap Performance Review for Local Exchange Carriers; Treatment of Video Dialtone Services Under Price Cap Regulation, Further Notice of Proposed Rulemaking, CC Docket 94-1, FCC 95-49 (released February 15, 1995).

219 MCI Data Comments at 5.

220 Video Dialtone Reconsideration Order at para. 191.

on the stand-alone costs of the existing narrowband telephone network. Subsequent changes in rates for these services are based on our price cap rules and are not determined by changes in cost.

Accounting Conditions and the Tariffing Process

89. We require NYNEX to account for all costs associated with its video dialtone service in accordance with Part 32. In order to ensure that these costs are not borne by rate payers of regulated services, and consistent with the requirements established in the Video Dialtone Reconsideration Order, we condition this authorization on a requirement that NYNEX segregate all costs incurred in providing video dialtone service into two sets of subsidiary accounting records.[221] We require NYNEX to create a set of subsidiary accounting records that identify all revenues, investment, and expenses wholly dedicated to video dialtone, and another set of records that capture any revenues, investment, and expenses that are shared between video dialtone and the provision of other services. These subsidiary accounting records shall include the direct costs and overheads associated with video dialtone service. In addition, summaries of the subsidiary accounting records shall be submitted to the Commission on a quarterly basis.

90. We also require NYNEX to account for the cost of non-common carrier and enhanced services or video customer premises equipment (CPE) in accordance with our rules, to the extent NYNEX offers such services. We conclude that NYNEX's proposed provision of these services and video CPE is consistent with the requirements contained in Section 63.54(d)(2) of our rules.[222] We condition this Section 214 authorization by requiring that, to the extent the non-regulated components of the video dialtone service are not already covered by NYNEX's CAM, NYNEX must revise its manual to show how it intends to allocate costs of such components between regulated and non-regulated activities.[223] All CAM revisions must be filed within thirty days after release of this Order, and sixty days before providing non-regulated services related to video dialtone.[224] At a minimum, in its submission, we require NYNEX to revise its CAM to include a list of all accounts affected by its provision of nonregulated video dialtone services and a description of each of those services. All CAM revisions related to the service will be subject to public comment and Commission scrutiny. We emphasize

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221 Id. at para. 173.

222 47 C.F.R. § 63.54(d)(2).

223 See 47 C.F.R. § 64.903(b).

224 See Video Dialtone Reconsideration Order at para. 181.

that our decision here, and the conditions we attach to it, are without prejudice to and in no way constrain any action that we may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

91. Our action in this proceeding in no way limits our ability to ensure, in the subsequent tariff review process, that NYNEX's tariffed rates, terms, and conditions for video dialtone service are just and reasonable. It is clear that consideration of costs in a Section 214 proceeding is distinct from the examination of rates in the tariff review process.[225] As the Commission staff stated in a 1986 decision, "[a] detailed inquiry into tariff related matters . . . would vitiate the distinction between tariff and facilities authorization procedures and would require the Commission to engage in duplicative processes."[226] Prior to providing service, NYNEX must file tariffs, and cost support information, which will be available for review.

92. We have determined that video dialtone service is a "new service" under price cap rules,[227] which apply to NYNEX.[228] In the Part 69/ONA Proceeding, the Commission established pricing standards for new services offered by companies subject to the price cap method of regulation.[229] In setting an upper bound for rates for such services, the Commission adopted a "flexible cost-based approach to pricing new services."[230] Under this test, the Commission requires LECs introducing new services to submit engineering studies, time and wage studies or other cost accounting studies to identify the direct costs of providing the new service,

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225 All American Cables at para. 5.

226 AT&T Authorization at para. 8.

227 Video Dialtone Reconsideration Order at para. 206.

228 In addition to being under price cap regulation at the federal level, we note that NYNEX is currently subject to price cap regulation in Rhode Island and has petitioned to be regulated under price cap regulation in Massachusetts. See NYNEX Supplemental Data Submission, response to Question 12. As we stated in the Video Dialtone Reconsideration Order, such state price cap regulation can "limit the ability of LECs to raise prices to captive rate payers of local telephone services." See Video Dialtone Reconsideration Order at para. 142.

229 Part 69/ONA Order; Part 69/ONA Reconsideration.

230 Part 69/ONA Order, para. 38; Part 69/ONA Reconsideration, at paras. 2-3, 6.

absent overheads.[231] Recognizing that LECs may have an incentive to understate direct costs and overheads in order to set unreasonably low prices for video dialtone service, in the Video Dialtone Reconsideration Order we required a more detailed and complete identification of direct costs, and a stronger justification for allocation of extremely low overheads, than we have generally required in other new services filings.[232] It is against these standards that we will judge the reasonableness of the tariffed rates NYNEX proposes for its video dialtone services.

4. Public Interest Benefits of the Proposed Video Dialtone Systems

93. In finding that video dialtone is in the public interest, the Commission concluded that video dialtone service would eliminate unnecessary regulatory barriers to competitive entry into the video marketplace and to investment by telephone companies.[233] The elimination of those barriers will help achieve three important goals: (1) facilitating competition in the provision of video services; (2) promoting private investment in an advanced telecommunications infrastructure; and (3) fostering the availability to the American public of new and diverse sources of video programming.[234] We believe that the projects proposed by NYNEX will provide these benefits.

94. NYNEX's proposals also will produce new investment in an advanced telecommunications infrastructure. The proposed integrated broadband and narrowband digital networks, capable of providing between 400 and 800 digital video channels, would bring advanced technology to nearly 400,000 homes and businesses in NYNEX's service area. Video servers, video administration modules, remote access modules, host digital terminals, multi-subscriber optical network units and associated software are among the advanced infrastructure elements under development. NYNEX's investment in these components could benefit the nation in several important ways. To the extent the technology and/or equipment is

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231 Part 69/ONA Order, at para. 42; Part 69/ONA Order Reconsideration, at para. 12. The evolution of the LEC price cap new services test and its application to video dialtone services is discussed in detail in the Video Dialtone Reconsideration Order at paras. 209-223.

232 Video Dialtone Reconsideration Order at para. 216. We provide specific guidance about these requirements in that Order at paras. 217-220.

233 Id. at paras. 3, 16.

234 Video Dialtone Order at para. 9.

designed, developed, and fabricated in the United States, such investment may stimulate manufacturing of high-technology products, which may increase employment opportunities and create potential export markets. It may also provide many indirect benefits in other fields, including marketing and training.

95. The proposals also promise to bring additional competition in the distribution of video services. Programmers using the video dialtone platform to distribute their programming will compete with one another as well as with the incumbent cable companies. These new competitors will create new outlets and opportunities for programmers and other users of system capacity. This will result in many of the same kinds of economic benefits that arise from investments in advanced infrastructure. This could include employment opportunities in information services, potential export opportunities, and secondary stimulative effects on supporting services and industries.

96. NYNEX indicates that both Massachusetts and Rhode Island support competition in the provision of local exchange service. In the Video Dialtone Reconsideration Order, we stated that the extent to which the states in which the service is proposed authorize competition for local exchange services is one of the factors which we may consider in the Section 214 review process.[235] According to NYNEX, Massachusetts and Rhode Island have authorized competition for some local exchange services, and are preparing to address in state proceedings various issues involved in bringing competition to the local loop.[236] NECTA's argument that there is not yet actual competition in the provision of local exchange services in Massachusetts and Rhode Island is not persuasive.[237] We believe that when we consider such issues in reviewing Section 214 applications for video dialtone, it is reasonable for us to review, inter alia, the extent to which the state where service is proposed authorizes competition for local exchange services, as opposed to the existence of current competition.[238] We recognize that it will take

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235 Video Dialtone Reconsideration Order at para. 142.

236 NYNEX Supplemental Data Submission, Response to Question 13. According to the National Association of Regulatory Utility Commissioners (NARUC), Massachusetts allows full facilites-based competition in the provision of local exchange service. NARUC Report on the Status of Competition in Intrastate Telecommunications at 76 (Aug. 1994 update). NARUC also reports that neither Massachusetts nor Rhode Island prohibit competition for local exchange service. Id. at 76, 145.

237 NECTA Data Comments at 4.

238 Video Dialtone Reconsideration Order at para. 142.

time for a competitive local exchange marketplace to develop, and we support and encourage the states to take steps or continue their efforts to make the provision of local exchange service competitive.

97. Finally, the proposals will give consumers in the affected areas additional choices in video programming and interactive digital services, as well as more facilities-based competition. NYNEX states the system will offer between 400 and 800 channels. While we, and NYNEX, can anticipate the likely and potential uses of system capacity, there is no way of knowing which of these choices end-users will find most attractive, nor of knowing what new choices will become available in five or ten years. The systems will offer multiple service providers open access to video dialtone platforms, and consumers access to those providers. This access is consistent with the nation's fundamental commitment to diversity and competition in the flow of ideas, not only with respect to entertainment but also with respect to education, health, and commerce.[239]

IV. NCTA MOTION TO DISMISS

A. Pleadings

98. On November 21, 1994, NCTA filed a motion to dismiss NYNEX's applications (NCTA Motion).[240] NCTA argues that NYNEX's applications fail to comply with the principles of video dialtone as set forth and modified in the Video Dialtone Reconsideration Order. Specifically, NCTA contends that: (1) NYNEX has failed to revise its applications in light of the Commission's jurisdictional ruling in the Video Dialtone Reconsideration Order; (2) NYNEX's economic justification is not sufficiently detailed to allow determination of the direct or incremental costs of its facilities; and (3) NYNEX has not shown that it will provide access to all would-be programmers on a nondiscriminatory basis.[241]

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239 See Video Dialtone Order at para. 1; Video Dialtone Reconsideration Order at para. 3; see also Dover Order at para. 41.

240 NYNEX filed its Opposition to NCTA's Motion To Dismiss on December 1, 1994 (NYNEX Opposition). On December 6, 1994, NCTA filed a Consolidated Reply (NCTA Reply) to the Oppositions of all the LECs against whom it had filed individual motions to dismiss, including NYNEX. Liberty Cable Company, Inc. filed reply comments on December 6, 1994 (Liberty Reply). On December 13, 1994, USTA filed reply comments (USTA Reply).

241 NCTA Motion at 2-3.

1. Jurisdictional Separations

99. NCTA challenges NYNEX's allocation of all costs to the interstate jurisdiction through the separations process in its application, which, of course, was filed before the Video Dialtone Reconsideration Order. NCTA argues in its motion to dismiss that NYNEX's applications are now "incorrect" because they do not reflect the evidently intrastate nature of certain service features described in the applications.[242] In particular, NCTA cites NYNEX's "Interactive Digital Channels" as having no apparent interstate nexus.[243]

100. NYNEX responds that partial carriage by radio waves may, in fact, render these services interstate. Moreover, NYNEX maintains, that the Commission should not dismiss its application based on NCTA's speculations, and instead give NYNEX a reasonable opportunity to investigate these complex matters and amend its application if necessary.[244]

101. NCTA argues generally that the LECs have failed to show that a jurisdictionally separate statement of costs is unnecessary in a Section 214 video dialtone determination of the public interest.[245] According to NCTA, the absence of this would ignore the role of the Section 214 process and the newly established allocation of jurisdictional responsibilities in the Video Dialtone Reconsideration Order. In particular, NCTA cites the specific instruction in that Order that LECs monitor and report to the Commission on the impact of video dialtone on separations results and intrastate rates.[246] In addition, NCTA contends that jurisdictionally separated projections of relative intrastate and interstate usage should be required to demonstrate that video dialtone will be fairly priced.[247]

2. Economic Justification

102. NCTA argues that the Commission's previous standard of requiring only a minimal showing of financial justification for

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242 NCTA Motion at 3-6.

243 Id. at 5-6 (citing Massachusetts Application, Exh. G, at y-5).

244 NYNEX Opposition at 4-5.

245 NCTA Reply at 8-9.

246 Id. (citing Video Dialtone Reconsideration Order at para. 186).

247 Id. at 9.

Section 214 authority has been made more exacting for video dialtone applications by the Video Dialtone Reconsideration Order. NCTA highlights statements from that Order that a video dialtone application must have full and detailed support for projected costs and revenues, with a showing of the underlying assumptions for the economic analysis.[248] Moreover, NCTA argues, video dialtone service is provided as part of an integrated system, and some common costs attributable to it may not be apparent unless all costs are carefully isolated. NCTA again stresses language from the Video Dialtone Reconsideration Order regarding the identification of all direct costs and reasonable allocations of shared costs and overhead to avoid cross-subsidy and discrimination.[249] In light of this higher standard, NCTA contends, NYNEX's failure to separate costs between jurisdictions is inadequate, and requires dismissal of the application.[250]

103. NYNEX denies that costs attributable to video dialtone are insufficiently isolated or identified in its statement of economic justification. According to NYNEX, its applications presented more than adequate detail under the Commission's Section 214 standards. Moreover, NYNEX claims, the Video Dialtone Reconsideration Order provided guidance for the identification of direct costs in subsequent tariff filings, but did not enlarge the requirements for economic justification in Section 214 applications.[251]

104. NCTA in its reply reiterates its position that the Video Dialtone Reconsideration Order establishes a higher standard for Section 214 cost support than either Century Federal or the Dover Order for video dialtone applications. NCTA notes that the oppositions filed by the LECs indicate disagreement over the proper standard under Section 214, and it is therefore surprising that they attack NCTA's effort to look to the requirements of the tariff process for instruction.[252] Overall, NCTA concludes, none of the applicants, including NYNEX, has satisfied the higher standard.[253]

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248 NCTA Motion at 6-7, comparing Century Federal v. FCC, 846 F.2d 1479 (D.C. Cir. 1988) with Video Dialtone Reconsideration Order at para. 125.

249 Id. at 7-9 (citing Video Dialtone Reconsideration Order at paras. 214, 216, 218, 220).

250 Id.

251 NYNEX Opposition at 5.

252 NCTA Reply at 5-6 (citing, inter alia, NYNEX Opposition at 5).

253 Id. at 5.

105. NCTA also rejects the argument of some LECs that strict cost allocation of video dialtone is unnecessary because price cap regulation with a separate basket for video dialtone will prevent cross-subsidy.[254] NCTA claims that the Video Dialtone Reconsideration Order recognizes that LECs under price caps retain a connection between total interstate costs and overall rate levels, and that video dialtone could generate costs which would effect sharing and upward rate adjustments for other services.[255]

3. Anchor Programmer/Favored Programmer

106. NCTA argues at length in its motion to dismiss that NYNEX's proposed video dialtone plans do not comply with the fundamental requirement of the Video Dialtone Order, the Video Dialtone Reconsideration Order, and various orders that have already granted Section 214 authorizations for video dialtone that a LEC's video dialtone platform be open to all programmers on a non-discriminatory basis.[256] In particular, NCTA claims that the common carrier obligation to serve all comers requires LECs to expand the capacity of their platforms, including analog capacity, to comply with this mandate. This is essential, NCTA argues, to prevent the LECs from involvement in the program selection process if demand exceeds capacity.[257] NCTA cites statements to this effect from five previous Section 214 authorizations, and representations of the Commission in oral argument before the U.S. Court of Appeals for the District of Columbia Circuit in National Cable Television Association v. FCC,[258] as well as the ensuing court decision itself.[259] NCTA acknowledges that the Video Dialtone Reconsideration Order modified the Video Dialtone Order to clarify that the obligation for such expansion is conditioned on technical feasibility and economical reasonableness. NCTA stresses, however, that a LEC claiming that it cannot immediately expand the platform must provide a detailed explanation and justification to the Commission.[260]

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254 Id. at 7-8 (citing, e.g., Ameritech Opposition at 6-7).

255 Id. (citing Video Dialtone Reconsideration Order at paras. 154, 223).

256 NCTA Motion at 10-17.

257 Id. at 10-11.

258 33 F.3d 66 (D.C. Cir. 1994).

259 NCTA Motion at 11-14.

260 Id. at 15-16 (citing Video Dialtone Reconsideration Order at para. 38).

107. NCTA contends that NYNEX's channel allocation proposal -- to dedicate 20 analog channels to broadcasters, to be managed and delivered by an Administrator, and to allocate digital capacity to all other programmers -- violates the foregoing principles. NCTA claims that the proposed plan is a form of anchor programming, which was rejected by the Commission in the Video Dialtone Reconsideration Order.[261] Similarly, NCTA argues that relegating non-broadcaster programmers to digital channels, which are more costly to end-users, is discriminatory and conflicts with the Commission's refusal in the Video Dialtone Reconsideration Order to grant preferential treatment to broadcasters.[262]

108. NYNEX disputes NCTA's suggestion that its analog capacity administrator proposal is equivalent to anchor programming or that the plan discriminates in favor of broadcasters. NYNEX states that its proposal involves elements of analog channel sharing which the Video Dialtone Reconsideration Order conditionally favored and on which the Commission requested additional comment in the Third Further Notice of Proposed Rulemaking. Similarly, NYNEX notes that its analog channels are subject to resale on nondiscriminatory terms and conditions.[263] Finally, NYNEX asserts that its current capacity allocation plan can be justified by economic or technical limitations, and that, in any event, it should have an opportunity to address these matters and prepare amendments if appropriate.[264]

109. Liberty Cable argues that if there are any problems with NYNEX's applications, such problems should be corrected by amendment rather than by dismissal of the application.[265] USTA contends that the NYNEX applications fully comply with both the Communications Act and the Commission's rules, and that the detailed cost estimates requested by NCTA are neither necessary nor appropriate.[266]

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261 Id. at 15-16 (citing Video Dialtone Reconsideration Order at para. 35).

262 Id. (citing Video Dialtone Reconsideration Order at para. 281).

263 NYNEX Opposition at 6.

264 Id. at 6-7.

265 Liberty Reply at 3.

266 USTA Reply at 2.

B. Discussion

110. As discussed in detail above, Section 214 requires the Commission to make a determination that the public convenience and necessity would be served by a carrier's proposed construction.[267] We do not agree with NCTA's assertion that we can only base our finding on the interstate aspects of the proposed video dialtone systems in evaluating Section 214 applications.[268] Section 214 does not set out specific requirements that the Commission must consider, but rather leaves the Commission "wide discretion" in deciding how to make its public interest determination.[269] Likewise, our rules implementing Section 214 refer to the public interest, convenience and necessity of the application, and do not set out specific requirements for the economic information to be provided.[270] Rather, the Commission has looked at the specific type of facilities to be constructed in determining the exact nature of the information required.[271]

111. We believe that it is important to look at the unseparated costs and revenues of the proposed video dialtone systems to determine if the systems are in the public interest. Just focusing on the interstate portion may not provide the Commission with a complete picture of how the proposed systems will operate, the types of services they will provide, or how the public will be benefitted by the system. Many of the new and innovative services that can be made available to the public because of video dialtone, such as interactive capabilities, may well be intrastate services. Yet they may provide important public benefits and we would be remiss to ignore those aspects of the proposal when considering these applications. We therefore find that we have the authority under the Communications Act and under our rules and regulations to examine unseparated rather than interstate only costs and revenues in making our Section 214 determination.

112. We emphasize that our approval of NYNEX's Section 214 applications is not intended to preempt state commissions from disallowing from local telephone service rates any video dialtone-related costs that do not meet their own standards for inclusion in

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267 See 47 U.S.C. § 214(a); see also supra para. 36.

268 We note that NCTA did not cite court or Commission decisions to support its argument. See NCTA Motion at 4-6.

269 FCC v. RCA Communications, 346 U.S. 86, 90 (1953). See also Competitive Carrier Rulemaking, 85 FCC 2d 1, 41 (1980).

270 See 47 C.F.R. § 63.01.

271 See, e.g., American Satellite Corp., 65 FCC 2d at 288.

rates.[272] In Iowa Network Access Division (INAD), the Common Carrier Bureau approved a Section 214 application for INAD to construct facilities to provide centralized equal access service, even though the applicant justified the construction in part with revenues it anticipated from intrastate service.[273] In authorizing the service, the Common Carrier Bureau recognized that the viability of the service depended on intrastate revenues, that the state of Iowa was examining the proposed service, and that state rejection of the service would fundamentally affect the Common Carrier Bureau's decision to approve the facilities. Accordingly, the Common Carrier Bureau conditioned its grant on state approval of the network without modifications that materially affect the relative amounts of interstate and intrastate usage. Similarly, we require as a condition of this authorization that NYNEX inform us within 30 days of any state action or requirement that fundamentally changes NYNEX's assumptions regarding its ability to recover the costs of its video dialtone system.

113. Regarding NCTA's other arguments regarding the financial information required for approval of these applications and allocation of channels, the petition does not present any arguments that were not raised in the previous pleadings on these applications. We have already discussed NYNEX's proposed channel allocation scheme,[274] and the level of review required for these applications under Section 214 and our rules.[275] We do not agree with NCTA that the Video Dialtone Reconsideration Order changed the standard for reviewing the Section 214 applications. The passage which NCTA cites is a background section which describes the existing standard,[276] and did not establish a new standard. NCTA also cites our discussion of the type of information we will

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272 Video Dialtone Reconsideration Order at para. 191.

273 INAD, 3 FCC Rcd 1468, 1473-74 (Com. Car. Bur. 1988), aff'd on recon. 4 FCC Rcd 3809 (Com. Car. Bur. 1989). Cf. American Telephone and Telegraph Company and Specified AT&T Communications Companies, 2 FCC Rcd 1716 (Com. Car. Bur. 1987) (Commission reviews forecasts for intrastate, as well as interstate circuits in application for blanket Section 214 certification).

274 See supra Section III. A. 2.

275 See supra Section III. B.

276 NCTA Motion at 6-7 (citing Video Dialtone Reconsideration Order at para. 125).

require for video dialtone tariffs.[277] The consideration of costs in a Section 214 proceeding is different from the examination of costs in the tariff review process.[278] Consequently, we do not find our discussion in the Video Dialtone Reconsideration Order of the level of information we will require in the tariff review process in any way changes the standard we will use in Section 214 proceedings. Therefore, we do not find that NCTA's motion provides any reason to alter our findings. The motion is therefore denied.

V. CONCLUSION

114. We find that the video dialtone systems NYNEX has proposed in its applications will serve the public convenience and necessity. NYNEX has supplied the information necessary to demonstrate that its proposals are consistent with the goals set forth in the Video Dialtone Order and our rules. A prima facie case has been made for the reasonable long-term viability of the projects and sufficient safeguards have been imposed to protect against unreasonable discrimination. The public interest will be served by expeditious implementation of the projects. Our action here is without prejudice to any subsequent action that might be taken in response to tariffs filed for these projects, or in rulemaking or other proceedings.

VI. ORDERING CLAUSES

115. Accordingly, IT IS ORDERED, that pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the applications of New England Telephone and Telegraph Company ("NYNEX") (FCC File Nos. W-P-C-6982 and W-P-C-6983) ARE GRANTED to the extent indicated in this order. NYNEX is authorized to provide video dialtone service, within the geographic areas described in its applications, subject to the terms of this Order.

116. IT IS FURTHER ORDERED that the petitions to deny filed by NCTA, NECTA, and Cox Enterprises, Inc. ARE DENIED.

117. IT IS FURTHER ORDERED, that grant of these applications IS SUBJECT TO the following CONDITIONS:

a) That NYNEX file an amended Section 214 application to obtain Commission approval of the structure of any proposed channel allocation mechanism, such as its proposal to allocate all of the platform's analog channels to over-the-air broadcasters, as well as

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277 NCTA Motion at 8-9 (citing Video Dialtone Reconsideration Order at paras. 216-220).

278 See Dover Order, 9 FCC Rcd at 3685-86, para. 43; see also All American Cables, File No. W-P-C-4990.

any proposal for a channel administrator or manager, before implementing any such mechanisms for any of the video dialtone systems authorized in this order.

b) That NYNEX file all revisions to its Cost Allocation Manual (CAM) within thirty days after release of this Order, and sixty days before providing non-regulated products or services related to video dialtone. NYNEX must also list all accounts affected by its provision of non-regulated services associated with its video dialtone service, and must describe those services.

c) That NYNEX create two sets of subsidiary accounting records: one to capture the revenues, investments, and expenses wholly dedicated to video dialtone, and the other to capture any revenues, investments and expenses that are shared between video dialtone and the provision of other services. NYNEX must file summaries of those records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Copies of those records must be also served on the Chief, Accounting and Audits Division, Common Carrier Bureau. We delegate to the Chief, Common Carrier Bureau, the authority to determine the content and format of these subsidiary accounting records as well as the quarterly reports. NYNEX is further required to keep subsidiary accounting records to identify by each Part 32 account the amount of all plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers.

d) That NYNEX provide all video programmers access to the basic platform under the same terms and conditions, and that NYNEX make all reasonable efforts to expand digital capacity in order to meet all reasonably foreseeable increases in demand for such channels. Furthermore, NYNEX shall report to the Chief of the Common Carrier Bureau, within thirty days of an anticipated digital capacity shortfall or within five days of denying any video programmer access to the platform due to digital capacity limitations, in whole or in part, and on the steps taken to expand the digital capacity of the platform so as to accommodate the increased demand for such channels. We also require NYNEX to report on the percentage of video dialtone end user subscribers or households obtaining digital set-top converters for use with services provided over the NYNEX video dialtone platform. The first such report shall be filed six (6) months after the video dialtone system becomes operational, i.e., the date on which service is available to at least one end user subscriber. Reports are to be filed every six (6) months thereafter for the next three (3) years.

e) That NYNEX make digital capacity available to customer-

programmers, and that set-top boxes be available for use by subscribers, when NYNEX begins to offer video dialtone service over these systems.

f) That, given that the NYNEX applications do not seek such authority, NYNEX shall not provide, pending completion of our rulemaking on LEC video programming safeguards, video programming directly to subscribers in its service area, absent prior Commission Section 214 approval. Thus, NYNEX may not, inter alia, participate in any decisions concerning the selection, packaging, pricing, bundling, or tiering of video programming to end users. Thereafter, NYNEX shall comply with the requirements adopted in the rulemaking.

g) That NYNEX comply prospectively with any changes in our rules that result from video dialtone or any other applicable rulemaking proceedings.

h) That no programmer may acquire more than 30 percent of the available capacity designated for digital broadcast channels.

118. IT IS FURTHER ORDERED that the Motion to Dismiss filed by NCTA on November 21, 1994 IS DENIED for the reasons stated herein.

119. IT IS FURTHER ORDERED, pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), the grant of NYNEX's applications to provide video dialtone service is subject to the conditions provided herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, pricing and other issues. Failure of NYNEX to decline the authorization as conditioned herein within thirty-one (31) days from the release date will be considered formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX: RECORD OF FILE NOS. W-P-C-6982 and W-P-C-6983

Application for Rhode Island, New England Telephone and Telegraph Company, July 8, 1994 (Rhode Island Application)

Application for Massachusetts, New England Telephone and Telegraph Company, July 8, 1994 (Massachusetts Application)

Supplement to Rhode Island Application, New England Telephone and Telegraph Company, July 29, 1994 (Rhode Island Supplement)

Supplement to Massachusetts Application, New England Telephone and Telegraph Company, July 29, 1994 (Massachusetts Supplement)

Petitions to Deny (both applications, unless otherwise noted)

New England Cable Television Association, September 9, 1994 (NECTA Petition)

National Cable Television Association, Inc., September 9, 1994 (NCTA Petition)

Petition to Deny Rhode Island Application, Cox Enterprises, Inc., September 9, 1994 (Cox Petition)

Opposition to Petitions to Deny

Consolidated Opposition to Petitions to Deny, New England Telephone and Telegraph Company, September 22, 1994 (NYNEX Opposition)

Replies to NYNEX Opposition to Petitions to Deny

New England Cable Association, October 4, 1994 (NECTA Reply)

National Cable Television Association, Inc., October 4, 1994 (NCTA Reply)

Cox Enterprises, October 4, 1994 (Cox Reply)

Motions and Responsive Pleadings

Motion to Dismiss, National Cable Television Association, Inc., November 21, 1994 (NCTA Motion)

Opposition to Motion to Dismiss, New England Telephone and Telegraph Company, December 1, 1994 (NYNEX Opposition to Motion)

Consolidated Reply, National Cable Television Association, Inc. (NCTA Reply to Opposition to Motion)

Liberty Cable Company, Inc., December 6, 1994 (Liberty Reply)

Reply to NYNEX Opposition to Motion to Dismiss, United States Telephone Association, December 13, 1994 (USTA Reply)

Information/Data Correspondence

Letter to C.R. Carrington, Director, Federal Regulatory Matters, NYNEX from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, December 9, 1994 (Wallman letter)

Ex Parte Letter from C.R. Carrington, Director, Federal Regulatory Matters, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, December 14, 1994

Ex Parte Letter from C.R. Carrington, Director, Federal Regulatory Matters, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, December 16, 1994

Supplemental Data Submission, New England Telephone and Telegraph Company, December 16, 1994 (NYNEX Supplemental Data Submission)

Ex Parte erratum letter regarding NYNEX Supplemental Data Submission from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, December 19, 1994

Ex Parte erratum letter regarding NYNEX Supplemental Data Submission from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, December 21, 1994

Ex Parte Letter from Susanne Guyer, Executive Director, Federal Regulatory Policy Issues, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, December 22, 1994

Comments in Response to NYNEX's Supplemental Data Submission

National Cable Television Association, Inc., December 23, 1994 (NCTA Data Comments)

Cox Enterprises, Inc., December 23, 1994 (Cox Data Comments)

Discovery Communications, Inc., December 23, 1994 (Discovery Comments)

MCI Telecommunications Corp., December 23, 1994 (MCI Data Comments)

New England Cable Television Association, December 23, 1994 (NECTA Data Comments)

Ex Parte Letter from David L. Nicoll, Associate General Counsel, National Cable Television Association to William F. Caton, Acting Secretary, Federal Communications Commission, January 24, 1995

Ex Parte Letter from G.R. Evans, Assistant Vice President, Federal Regulatory Affairs, NYNEX to William F. Caton, Acting Secretary, Federal Communications Commission, January 27, 1995

Comments of Sommerville Community Access Television, January 27, 1995

Ex Parte Letter from David L. Nicoll, Associate General Counsel, National Cable Television Association, to William F. Caton, Acting Secretary, Federal Communications Commission, January 31, 1995